14-1505

No. 14-___

IN THE

Supreme Court of the United States

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, A CORPORATION SOLE, ET AL.,

Petitioners,

v.

SYLVIA BURWELL, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether the Religious Freedom Restoration Act ("RFRA") allows the Government to force objecting religious nonprofit organizations to violate their beliefs by offering health plans with "seamless" access to coverage for contraceptives, abortifacients, and sterilization.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners, who were Plaintiffs below, are the Roman Catholic Archbishop of Washington ("the Archdiocese"); the Consortium of Catholic Academies of the Archdiocese of Washington, Inc.; Archbishop Carroll High School, Inc.; Don Bosco Cristo Rey High School of the Archdiocese of Washington, Inc.; Mary of Nazareth Roman Catholic Elementary School, Inc.; Catholic Charities of the Archdiocese of Washington, Inc.; Victory Housing, Inc.; the Catholic Information Center, Inc.; the Catholic University of America; and Thomas Aquinas College. No Petitioner has a parent corporation. No publicly held corporation owns any portion of any of the Petitioners, and none of the Petitioners is a subsidiary or an affiliate of any publicly owned corporation.

Respondents, who were Defendants below, are Sylvia Burwell, in her official capacity as Secretary of the United States Department of Health and Human Services; the United States Department of Health and Human Services; Thomas E. Perez, in his official capacity as Secretary of the United States Department of Labor; the United States Department of Labor; Jacob J. Lew, in his official capacity as Secretary of the United States Department of the Treasury; and the United States Department of the Treasury.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners are religious nonprofits who sincerely believe that it would be immoral for them to provide, pay for, or facilitate access to abortifacients, contraception, or sterilization in a manner that violates the teachings of the Catholic Church. The Government, however, has made it effectively impossible for Petitioners to offer health coverage to their employees and students in a manner consistent with their religious beliefs. Among other things, the Government compels Petitioners to (1) contract with third parties that will provide or procure the objectionable coverage for those enrolled in Petitioners' health plans, and (2) submit documentation that, in their religious judgment, makes them complicit in the delivery of such coverage. It is undisputed that these actions violate Petitioners' religious beliefs, and it is equally undisputed that if Petitioners refuse to take these actions, they will be subject to massive fines.

Contrary to the Government's characterization, this case is not about a challenge to an exemption or an "opt out," because the regulatory scheme forces Petitioners to act in ongoing violation of their religious beliefs. This case also is not about denying access to free contraceptive coverage, because "the Government can readily arrange for other methods of providing contraceptives, without cost sharing, to employees who are unable to obtain them under their health-insurance plans due to their employers' religious objections." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 & n.37 (2014).

Accordingly, this case is only about whether the Government can commandeer Petitioners and their

health plans as vehicles for delivering abortifacient and contraceptive coverage in violation of their religion. Although Petitioners oppose the Government's goal of providing such coverage as a policy matter, they do not challenge the legality of that objective. Rather, Petitioners ask only that they not be forced to participate in this effort. RFRA clearly accords them that right. Petitioners thus respectfully submit this petition for a writ of certiorari to review the final judgment of the United States Court of Appeals for the D.C. Circuit.

OPINIONS BELOW

The opinion of the district court is reported at 19 F. Supp. 3d 48. Pet.App.94a. The order of the D.C. Circuit granting an injunction pending appeal is unreported. Pet App.212a. The opinion of the D.C. Circuit is reported at 772 F.3d 229, Pet.App.1a, and its order denying rehearing en banc is reported at 2015 U.S. App. LEXIS 8326, Pet.App.222a.

JURISDICTION

The judgment of the D.C. Circuit was entered on Nov. 14, 2014. Pet.App.1a. That court denied rehearing en banc on May 20, 2015. Pet.App.222a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

LEGAL PROVISIONS INVOLVED

The following provisions are reproduced in Appendix H (Pet.App.281a): 42 U.S.C. §§ 2000bb-1, 2000bb-2, 2000cc-5, 300gg-13; 26 U.S.C. §§ 4980D, 4980H; 26 C.F.R. §§ 54.9815-2713, 54.9815-2713A, 54.9815-2713AT; 29 C.F.R. §§ 2510.3-16, 2590.715-2713, 2590.715-2713A; 45 C.F.R. §§ 147.130, 147.131.

STATEMENT OF THE CASE

A. The Mandate

The Patient Protection and Affordable Care Act ("ACA") requires "group health plan[s]" and "health insurance issuer[s]" to cover women's "preventive care." 42 U.S.C. § 300gg-13(a)(4) (the "Mandate"). Employers that fail to include the required coverage are subject to penalties of $100 per day per affected beneficiary. 26 U.S.C. § 4980D(b). Dropping health coverage likewise subjects employers with more than fifty employees to penalties of $2,000 per year per employee after the first thirty employees. *Id.* § 4980H(a), (c)(1).

Congress did not define women's "preventive care." The Department of Health and Human Services ("HHS") also declined to define the term and instead outsourced the definition to a private nonprofit, the Institute of Medicine ("IOM"). 75 Fed. Reg. 41,726, 41,731 (July 19, 2010). The IOM then determined that "preventive care" should include "all [FDA]-approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity," HRSA, Women's Preventive Services Guidelines, http://www.hrsa.gov/womensguidelines (last visited June 18, 2015), and HHS subsequently adopted that definition, 26 C.F.R. § 54.9815-2713(a)(1)(iv); 29 C.F.R. § 2590.715-2713(a)(1)(iv); 45 C.F.R. § 147.130(a)(1)(iv). Some FDA-approved contraceptive methods (such as Plan B and ella) can induce an abortion. *Hobby Lobby*, 134 S. Ct. at 2762-63 & n.7.

1. Full Exemptions from the Mandate

From its inception, the Mandate exempted numerous health plans covering millions of people. For example, certain plans in existence at the time of the ACA's adoption are "grandfathered" and exempt from the Mandate as long as they do not make certain changes. 42 U.S.C. § 18011; 26 C.F.R. § 54.9815-1251T(g). As of May 2015, over 46 million individuals participate in grandfathered plans. HHS, ASPE Data Point, The Affordable Care Act Is Improving Access to Preventive Services for Millions of Americans 3 (May 14, 2015), http:// http://aspe.hhs.gov/health/reports/2015/Prevention/ib_Prevention.pdf.

Additionally, in acknowledgement of the burden the Mandate places on religious exercise, the Government created a full exemption for plans sponsored by entities it deems "religious employers." 45 C.F.R. § 147.131(a). That category, however, includes only religious orders, "churches, their integrated auxiliaries, and conventions or associations of churches." *Id.* (citing 26 U.S.C. § 6033(a)(3)(A)(i) & (iii)). These entities are allowed to offer conscience-compliant health coverage through an insurance company or third-party administrator ("TPA") that will not provide or procure contraceptive coverage. 78 Fed. Reg. 39,870, 39,873 (July 2, 2013). Notably, this exemption is available for qualifying "religious employers" regardless of whether they object to providing contraceptive coverage. 45 C.F.R. § 147.131(a).

At the same time, the "religious employer" exemption does *not* apply to many devoutly religious

nonprofit groups that *do* object to contraceptive coverage. According to the Government, these nonprofit religious groups do not merit an exemption because they are not as "likely" as "[h]ouses of worship and their integrated auxiliaries" "to employ people of the same faith who share the same objection" to "contraceptive services." 78 Fed. Reg. at 39,874. The administrative record contains no evidence in support of this assertion.

2. The Nonprofit Mandate

Instead of expanding the "religious employer" exemption, the Government announced that non-exempt religious nonprofits would be "eligible" for an inaptly named "accommodation." 78 Fed. Reg. at 39,871 (July 2, 2013) (the "Nonprofit Mandate"). In reality, however, the "accommodation" involves a new mandate that also forces religious objectors to violate their beliefs.

Under the Nonprofit Mandate, an objecting religious organization must either provide a "self-certification" directly to its insurance company or TPA, or submit a "notice" to the Government providing detailed information on the organization's plan name and type, along with "the name and contact information for any of the plan's [TPAs] and health insurance issuers." 26 C.F.R. § 54.9815-2713A(a); *id.* § 54.9815-2713AT(b)(1)(ii)(B), (c)(1)(ii). The ultimate effect of either submission is the same: by submitting the documentation, the eligible organization authorizes, obligates, and/or incentivizes its insurance company or TPA to arrange "payments for contraceptive services" for beneficiaries enrolled in the organization's health plan. *Id.* §§ 54.9815-2713A(a), 54.9815-2713AT(b)-(c).

"If" the organization submits the self-certification, then it directly triggers the obligation for its own TPA or insurance company to provide the objectionable coverage. *Id.* §§ 54.9815-2713A(a), 54.9815-2713AT(b)-(c). And "if" the organization instead submits the notice to the Government, the Government "send[s] a separate notification" to the organization's insurance company or TPA "describing the[ir] obligations" to provide the objectionable coverage. *Id.* § 54.9815-2713AT(b)(1)(ii)(B), (c)(1)(ii). In either scenario, payments for contraceptive coverage are available to beneficiaries only "so long as [they] are enrolled in [the religious organization's] health plan." 29 C.F.R. § 2590.715-2713A(d).

The Nonprofit Mandate has additional implications for organizations that offer self-insured health plans. The Government concedes that in the self-insured context, "'the contraceptive coverage is part of the [self-insured organization's health] plan.'" Pet.App.145a. Both the self-certification and the notification provided by the Government upon receipt of the eligible organization's submission are deemed to be "instrument[s] under which the plan is operated," 29 C.F.R. § 2510.3-16(b), and serve as the "designation of the [organization's TPA] as plan administrator and claims administrator for contraceptive benefits," 78 Fed. Reg. at 39,879. Consequently, the TPA of a self-insured health plan is *barred* from providing contraceptive benefits to the plan beneficiaries *unless* the sponsoring organization provides the self-certification or notification.[1]

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[1] *See* 29 U.S.C. § 1002(16)(A) (limiting the definition of a plan administrator to "the person specifically so designated

In addition, the Nonprofit Mandate provides a unique incentive for objecting organizations' TPAs to provide the objectionable coverage. If an eligible organization complies with the Nonprofit Mandate, its TPA becomes eligible to be reimbursed for the full cost of providing the objectionable coverage, plus 15 percent. 26 C.F.R. § 54.9815-2713AT(b)(3); 79 Fed. Reg. 13,744, 13,809 (Mar. 11, 2014). TPAs receive this incentive, however, only if the self-insured organization submits the required self-certification or notification.

Finally, the Nonprofit Mandate requires self-insured religious groups to "contract[] with one or more" TPAs, 26 C.F.R. § 54.9815-2713AT(b), but TPAs are under no obligation "to enter into or remain in a contract with the eligible organization," 78 Fed. Reg. at 39,880. Consequently, self-insured organizations must either maintain a contractual relationship with a TPA that will provide the objectionable coverage to their plan beneficiaries, or find and contract with a TPA willing to do so.

B. Petitioners

Petitioners are nonprofit Catholic organizations that provide a range of spiritual, charitable, educational, and social services. Petitioners' religious

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by the terms of the instrument under which the plan is operated"); *id.* § 1102(a)(1), (b)(3) (providing that self-insured plans must be "established and maintained pursuant to a written instrument," which must include "a procedure for amending [the] plan, and for identifying the persons who have authority to amend the plan"); 79 Fed. Reg. 51092, 51095 n.8 (August 27, 2014).

beliefs forbid them from taking actions that would make them complicit in the delivery of coverage for abortifacients, contraception, or sterilization services, or that would create "scandal" by encouraging through words or deeds other persons to engage in wrongdoing. Petitioners sincerely believe that compliance with the regulations would violate these principles. Pet.App.15a-16a, 115a-16a.

Historically, Plaintiffs have exercised their religious beliefs by offering health coverage in a manner consistent with Catholic teaching. In particular, they have contracted with insurers and TPAs that would provide conscience-compliant health coverage to their plan beneficiaries, and would not provide or procure coverage for abortifacients, contraceptives, or sterilization. Pet.App.15a-16a. Petitioner Roman Catholic Archbishop of Washington—the formal name for the Archdiocese of Washington—operates a self-insured health plan that qualifies as a "church plan" for purposes of ERISA. Pet.App.13a. This plan covers the Archdiocese's employees as well as the employees of its affiliated ministries, including Petitioners Consortium of Catholic Academies, Archbishop Carroll High School, Don Bosco Cristo Rey High School, Mary of Nazareth Elementary School, Catholic Charities, Victory Housing, and the Catholic Information Center. Pet.App.13a-14a. Petitioner Catholic University of America offers its employees insured health plans provided by United Healthcare, and makes insurance available to its students through AETNA. Pet.App.14a-15a. Petitioner Thomas Aquinas College offers its employees a non-church health plan through the RETA Trust, a self-

insurance trust established by the Catholic bishops of California. Pet.App.14a.

Despite their avowedly religious missions, none of Petitioners except the Archdiocese qualify as exempt "religious employers." Even the Archdiocese is not truly exempt because it offers its health plan to the employees of its non-exempt affiliates, whose employees thus become eligible to receive the objectionable coverage through the Archdiocese's plan under the Nonprofit Mandate. Pet.App.13a-14a.

C. The Proceedings Below

Petitioners filed suit in September 2013. The district court issued a final judgment in favor of Petitioner Thomas Aquinas College, but rejected all other Petitioners' RFRA claims. Pet.App.211a. [2] Petitioners and the Government both appealed.

The D.C. Circuit granted Petitioners' motion for an injunction pending appeal, holding that Petitioners "satisfied the requirements" for injunctive relief under *Winter v. NRDC*, 555 U.S. 7 (2008). Pet.App.213a. The court also consolidated this case with *Priests for Life v. U.S. Department of Health & Human Services*, No. 13-5368. Pet.App.213a. The Court scheduled oral argument before an assigned panel in March 2014, Pet.App.221a, but then *sua sponte* reset the case for argument before a different panel, Pet.App.221a.

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[2] Petitioners also prevailed in a First Amendment challenge to a regulation prohibiting them from seeking to "influence" their TPA's decision to provide contraceptive coverage. Pet.App.100a.

After hearing oral argument and ordering supplemental briefing on *Hobby Lobby*, the D.C. Circuit rejected all of Petitioners' claims. Pet.App.93a. The court first found no substantial burden on Petitioners' religious exercise because the regulations "impose[] [only] a *de minimis* requirement" on Petitioners that required them to do nothing more than submit "a single sheet of paper." Pet.App.34a. The court asserted that forcing Petitioners to submit the required paperwork and then maintain the objectionable contractual relationship would not impose a substantial burden because those actions "do not," in fact, "'facilitate contraceptive coverage." Pet.App.42a.

The court also held that the regulations would survive strict scrutiny, despite the Government's contrary concession in light of previous circuit precedent. Pet.App.117a. According to the panel, the Government has a compelling interest in ensuring "seamless coverage of contraceptive services" in connection with Petitioners' health plans. Pet.App.56a. In the court's view, there are no viable alternative means to provide the coverage, because "[i]mposing even minor added steps" on women to obtain the coverage from any other source "would dissuade [them] from obtaining contraceptives." Pet.App.68a.

Petitioners sought rehearing en banc, which the court denied on May 20, 2015. Judge Brown, joined by Judge Henderson, filed a dissent arguing that "this exceptionally important case is worthy of en banc review" because "[t]he panel's substantial burden analysis is inconsistent with the precedent of the Supreme Court." Pet.App.236a. Judge Brown

would have found a substantial burden because "Plaintiffs identif[ied] at least two acts that the regulations compel them to perform that they believe would violate their religious obligations: (1) 'hiring or maintaining a contractual relationship with any company required, authorized, or incentivized to provide contraceptive coverage to beneficiaries enrolled in Plaintiffs' health plans,' and (2) 'filing the self-certification or notification.'" Pet.App.239a (internal citation omitted). Judge Brown then turned to strict scrutiny, arguing that "[e]ven assuming for the sake of argument that the government possesses a compelling interest in the provision of contraceptive coverage," the Government had "pointed to no evidence in the record" to prove that the coverage must be provided "'seamless[ly]'" through the employer-based health plans of objecting religious nonprofits. Pet.App.246a.

Judge Kavanaugh wrote a separate dissent, arguing that "the regulations substantially burden the religious organizations' exercise of religion because the regulations require the organizations to take an action contrary to their sincere religious beliefs (submitting the form) or else pay significant monetary penalties." Pet.App.255a. He then reasoned that the regulations must fail RFRA's least-restrictive-means test because "[u]nlike the form required by current federal regulations, the [notice this Court ordered in] *Wheaton College/Little Sisters of the Poor* . . . does not require a religious organization to identify or notify its insurer, and thus lessens the religious organization's complicity in what it considers to be wrongful." Pet.App.256a.

Petitioners thereafter asked the D.C. Circuit to stay its mandate pending certiorari. On June 10, 2015, the D.C. Circuit granted a stay pending disposition of this petition. Pet.App.279-80a.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted under this Court's traditional criteria.

First, the decision below conflicts with *Hobby Lobby* and related precedent. *Hobby Lobby* held that the Government substantially burdens religious exercise whenever it forces plaintiffs to "engage in conduct that seriously violates their religious beliefs" on pain of "substantial" penalties. 134 S. Ct. at 2775-76. The court below ignored that holding, substituting its religious judgment for that of Petitioners to declare that compliance with the regulations would not truly "facilitate contraceptive coverage" in violation of Catholic doctrine. Pet.App.42a. As at least five different circuit judges have recognized, this judicial second-guessing of private religious beliefs cannot be squared with *Hobby Lobby*. Pet.App.52a (Brown, J., dissenting, joined by Henderson, J.) ("Plaintiffs, including an Archbishop and two Catholic institutions of higher learning, say compliance with the regulations would facilitate access to contraception in violation of the teachings of the Catholic Church[, and no] law or precedent grants [any court] authority to conduct an independent inquiry into the correctness of this belief[.]"); Pet.App.242a (Kavanaugh, J., dissenting) (same); *Univ. of Notre Dame v. Burwell*, No. 13-3853, 2015 U.S. App. LEXIS 8234, at *59-60 (7th Cir. May 19, 2015) (Flaum, J., dissenting) (same); *Eternal Word Television Network, Inc. v. HHS*, 756 F.3d 1339

(11th Cir. 2014) ("*EWTN*") (Pryor, J., concurring) (same).

The lower court's strict-scrutiny analysis also conflicts with this Court's precedent by relying on sweeping interests in "'public health'" and "'gender equality,'" which *Hobby Lobby* rejected as overbroad. 134 S. Ct. at 2779. The lower court disregarded *Hobby Lobby*'s holding that the Government bears the burden of proof, and upheld the regulations despite the Government's failure to offer *any evidence* that it must use Petitioners' health plans as the conduit to deliver the objectionable coverage.

Second, the lower court deepened an existing circuit split over the nature of RFRA's substantial-burden inquiry, and created a new circuit split on whether the regulations satisfy strict scrutiny. On the first issue, the court held, in agreement with the Third Circuit, that regulations forcing religious adherents to act contrary to their beliefs do not impose a substantial burden if the court deems those obligations "*de minimis*" or inconsequential. By contrast, the Seventh, Tenth, and Eleventh Circuits have held that the substantial-burden test focuses on *coercion*. In those circuits, the Government substantially burdens religious exercise whenever it forces religious adherents to take *any* action that violates their sincere religious beliefs on pain of substantial penalty.

On the strict-scrutiny issue, the court below held that the Government has a compelling interest in providing free contraceptive coverage, and that the only viable means to achieve that goal is to conscript the private health plans of objecting nonprofits. By contrast, the Seventh and Tenth Circuits have held

that the regulations cannot satisfy strict scrutiny due to the many exemptions the Government has already granted, as well as the many alternative means through which the Government could deliver contraceptive coverage without hijacking the private health plans of religious objectors.

Third, both of these issues are exceptionally important because they implicate core protections of religious liberty, and because they affect thousands of religious nonprofits around the country, which hope to avoid being put to the choice between violating their religious beliefs or incurring ruinous penalties.

Finally, this case presents an ideal vehicle for resolving this question. The panel opinion addresses *Hobby Lobby* and the revised regulations directly. It discusses all issues in the case: substantial burden, compelling interest, and least-restrictive means. These matters were vigorously aired and debated below, including in two dissenting opinions. And perhaps most importantly, this case presents the full gamut of insurance arrangements that may give rise to RFRA claims (insured plans, self-insured plans, church plans, and non–church plans).

Accordingly, this Court should grant certiorari and reverse the decision below.

I. THE DECISION BELOW CONFLICTS WITH *HOBBY LOBBY* AND THIS COURT'S OTHER PRECEDENT

RFRA prohibits the Government from imposing a "substantial burden" on religious exercise unless doing so "is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1. The panel's conclusion that the

regulations at issue survive that analysis conflicts directly with this Court's precedent.

A. The Regulations Substantially Burden Petitioners' Religious Exercise

Under *Hobby Lobby*, the test for a "substantial burden" on religious exercise is whether the Government is imposing substantial pressure on religious adherents to take (or forgo) *any* action contrary to their sincere religious beliefs. That test is met when the Government "demands that [plaintiffs] engage in conduct that seriously violates their religious beliefs" or else suffer "substantial economic consequences." 134 S. Ct. at 2775-76; *see also Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015) (concluding that the petitioner "easily satisfied" the substantial burden standard where he was "put[] . . . to this choice" of violating his religious beliefs or suffering "serious disciplinary action"); *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981) (defining "substantial burden" on religious exercise as "substantial pressure on an adherent to modify his behavior and to violate his beliefs").

Applying that test here leads inexorably to the conclusion that the regulations substantially burden Petitioners' religious exercise. Just as in *Hobby Lobby*, Petitioners believe that if they "comply with the [regulations]" "they will be facilitating" immoral conduct in violation of their religion. 134 S. Ct. at 2759. And just as in *Hobby Lobby*, if Petitioners "do not comply" "they will pay a very heavy price." *Id.* In short, because the Government "forces [Petitioners] to pay an enormous sum of money . . . if they insist on providing insurance coverage in accordance with their religious beliefs, [it has] clearly impose[d] a

substantial burden" on their religious exercise. *Id.* at 2779.

Rather than applying this test, the panel below did not even cite *Hobby Lobby* in its substantial-burden analysis. Instead of evaluating whether the "consequences" for noncompliance would be "severe," 134 S. Ct. at 2775, the court erroneously focused on the *nature of the actions required* by the Nonprofit Mandate. The court thus dismissed Petitioners' religious objections as involving only a "bit of paperwork" and the submission of a "single sheet of paper." Pet.App.7a. In the panel's view, complying with the regulations was nothing more than a "*de minimis* administrative" burden. Pet.App.38a, 48a (stating that "the regulatory requirement that [Petitioners file] a sheet of paper" "is not a burden that any precedent allows us to characterize as substantial").

The panel's analysis squarely conflicts with *Hobby Lobby*. That decision made clear that RFRA protects "'*any* exercise of religion,'" 134 S. Ct. at 2762 (emphasis added), which includes "'the performance of (or abstention from) physical acts'" that are "engaged in for religious reasons," *id.* at 2770 (quoting *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990)). It makes no difference whether the religious exercise at issue is refraining from shaving one's beard (*Holt*), refraining from paying for contraceptive coverage (*Hobby Lobby*), or refraining from maintaining an objectionable contractual relationship and submitting an objectionable form (here). Pet.App.266a (Kavanaugh, J., dissenting) (explaining that being forced to comply with the Nonprofit Mandate is no different than being forced

to "shav[e] your beard," "send[] your children to high school," "pay[] the Social Security tax," or "work[] on the Sabbath"). Once a plaintiff identifies an action that would violate his religious beliefs, the only question for a court is whether the Government has placed "substantial" pressure on the plaintiff to take that action. 134 S. Ct. at 2776-79. It is plaintiffs who must "dr[a]w" a "line" regarding the actions their religion deems objectionable. *Id.* at 2778-79. Once that line is drawn, "'it is not for [courts] to say that [it is] unreasonable.'" *Id.* at 2778 (quoting *Thomas*, 450 U.S. at 715).

Likewise, the lower court's repeated insistence that the Nonprofit Mandate amounts to an "opt out" is plainly false. In fact, the Nonprofit Mandate forces Petitioners to violate their beliefs by submitting objectionable documentation and maintaining an objectionable contractual relationship. The lower court's assertion that taking these actions "do[es] not," in fact, "'facilitate contraceptive coverage," Pet.App.42a, flatly ignores *Hobby Lobby*'s command that plaintiffs, not courts, must determine whether an act "is connected" to illicit conduct "in a way that is sufficient to make it immoral." 134 S. Ct. at 2778. The lower court failed to appreciate that whether the required actions make Petitioners complicit in wrongdoing or allow them to "wash[] their hands of any involvement in [contraceptive] coverage," Pet.App.28a, is itself a religious judgment rooted in Catholic teachings. As *Hobby Lobby* confirms, courts may not "[a]rrogat[e]" unto themselves "the authority" to "answer" the "religious and philosophical question" of "the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of

enabling or facilitating the commission of an immoral act by another." 134 S. Ct. at 2778.

For similar reasons, *Hobby Lobby* also forecloses the panel's attempt to recast Petitioners' religious objection as an "object[ion] to . . . the government's independent actions in mandating contraceptive coverage, not to any action that the government has required [Petitioners] themselves to take." Pet.App.37a (citing *Bowen v. Roy*, 476 U.S. 693 (1986); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988)). Contrary to the lower court's characterization, Petitioners' RFRA claim is not based on mere "unease" or "anguish" at the prospect of "third parties provid[ing] Plaintiffs' beneficiaries [with] products and services that Plaintiffs believe are sinful." Pet.App.27a, 37a. Rather, the regulations compel *Petitioners themselves* to violate their religious beliefs by submitting objectionable documentation and maintaining an objectionable insurance relationship. "Make no mistake: the harm [Petitioners] complain of" is "their inability to conform *their own* actions and inactions to their religious beliefs without facing massive penalties from the government." Pet.App.236a (Brown, J., dissenting).

Hobby Lobby rejected a similar attempt to transform plaintiffs' religious objection into an objection to the actions of third parties. "There, as here, [the Government's] main argument was 'basically that the connection between what the objecting parties must do . . . and the end that they find to be morally wrong . . . [was] simply too attenuated.'" *Notre Dame*, 2015 U.S. App. LEXIS 8234, at *59 (Flaum, J., dissenting). In other words,

the Government argued that the plaintiffs had no cognizable claim under RFRA because "the ultimate event" to which they objected—"the destruction of an embryo"—would come about only as a result of independent actions taken by others. 134 S. Ct. at 2777 & n.33. The Court rightly noted that the Government's argument "dodge[d] the question that RFRA presents" because it refused to acknowledge the plaintiffs' religious objections were based on their perceived moral duty to avoid "enabling or facilitating the commission of an immoral act by another." *Id.* at 2778. The same is true here. *See* Pet.App.241-45a (Brown, J., dissenting); Pet.App.252-78a (Kavanaugh, J., dissenting); *Notre Dame*, 2015 U.S. App. LEXIS 8234, at *60 (Flaum, J., dissenting).

Finally, the panel asserted that Petitioners' objection rests on a simple misunderstanding of "how the challenged regulations operate." Pet.App.229a (Pillard, J., concurring). That assertion is based on the panel's view that Petitioners' "insurers and TPAs" have an "independent obligation" to provide the objectionable coverage to Petitioners' beneficiaries, and that if Petitioners only understood this, they would not object to the Nonprofit Mandate. Pet.App.42a. That is doubly wrong.

At the outset, Petitioners would object to compliance even if the regulatory scheme worked exactly as described by the panel. Petitioners object to "'hiring or maintaining a contractual relationship with any company required, authorized, or incentivized to provide contraceptive coverage to beneficiaries enrolled in [Petitioners'] health plans.'" Pet.App.239a (Brown, J., dissenting). And everyone

agrees that under the Nonprofit Mandate, Petitioners will incur ruinous penalties unless they maintain such a relationship. Moreover, as Judge Kavanaugh recognized, it is also undisputed that the Nonprofit Mandate forces Petitioners to submit a "'self-certification'" or "'notification'" form that must either "identify or notify their insurers." Pet.App.239a, 273a (Kavanaugh, J., dissenting). Petitioners would object to filing such a document even if the regulations worked exactly as articulated by the panel. Thus, even under the panel's interpretation, the Nonprofit Mandate would still impose a substantial burden on Petitioners by forcing them to maintain an objectionable contractual relationship and submit an objectionable form. *Cf. Notre Dame*, 2015 U.S. App. LEXIS 8234, at *58-59 (Flaum, J., dissenting) (stating that the existence of an independent obligation "really is of no moment here, because Notre Dame also believes that being driven into an ongoing contractual relationship with an insurer" that provides the objectionable coverage would violate its beliefs).

In any event, the D.C. Circuit panel was clearly wrong to suggest that Petitioners' TPAs and insurers have an "independent obligation" to provide the objectionable coverage to Petitioners' employees. In the self-insured context, the Government has *conceded* that "[a TPA's] duty to [provide the mandated coverage] only arises by virtue of the fact that [it] has a contract with the religious organizations" and has "receive[d] the self-certification form." Hr'g Tr. at 12-13, *Roman Catholic Archbishop of Wash. v. Sebelius*, No. 13-1441 (D.D.C. Nov. 22, 2013). Indeed, the regulations plainly state that a TPA is obligated to "provide or arrange

payments for contraceptive services" only "if" an eligible organization decides to invoke the "accommodation" by submitting the self-certification or notification document. 26 C.F.R. § 54.9815-2713AT(b)(2). This unequivocal conditional language makes clear that a TPA "bears the legal obligation to provide contraceptive coverage *only* upon receipt of a valid self-certification" or notification. *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2814 n.6 (2014) (Sotomayor, J., dissenting) (emphasis added).

Likewise, in the context of an insured plan, a religious organization's insurance issuer has no obligation to provide "separate" contraceptive coverage unless the organization invokes the "accommodation" by submitting the self-certification or notification. 45 C.F.R. § 147.131(c)(2). The mandated coverage cannot be otherwise provided, because *Hobby Lobby* forbids the Government from requiring such coverage to be included in an objecting religious organization's health plan.

Moreover, the notion of an "independent obligation" is plainly wrong because if Petitioners stopped offering health plans to their employees and students, then their insurers and TPAs would have no obligation to provide the objectionable coverage. *See* 26 C.F.R. § 54.9815-2713AT(b)(2) (stating that a TPA has an obligation to provide or procure coverage only if it is "in a contractual relationship with the eligible organization"); *id.* § 54.9815-2713A(c)(2)(B) (stating that insurance issuers must provide payments for contraceptive services "for plan participants and beneficiaries for so long as they remain enrolled in the plan").

Indeed, this Court need look no further than the Government's own arguments to confirm Petitioners' integral role in the regulatory scheme. If TPAs and insurers truly had an "independent" obligation to provide the mandated coverage to Petitioners' beneficiaries, then the Government could not plausibly claim that exempting Petitioners "would deprive hundreds of employees" of abortifacient and contraceptive coverage. Opp'n at 36, *Wheaton*, 134 S. Ct. 2806 (U.S. July 2014) (No. 13A1284). And if the regulatory scheme were in fact completely "disassociated" and "separate" from Petitioners' actions, Pet.App.43-44a, the Government could not possibly have a "compelling interest" in coercing Petitioners' compliance. "After all, if the form were meaningless, why would the government require it?" Pet.App.264a (Kavanaugh, J., dissenting).

B. The Regulations Cannot Survive Strict Scrutiny

In addition to concluding that the regulations did not substantially burden Petitioners' religious exercise, the panel also held that the regulations survived strict scrutiny. In the process, it transformed a mere eight pages of the Government's supplemental briefing on this (previously conceded) issue into a twenty-one page paean to a "confluence of compelling interests" that purportedly necessitate the conscription of the health plans of religious objectors to ensure "seamless" provision of contraceptive coverage. Pet.App.8a. That conclusion cannot be squared with *Hobby Lobby*, *Holt*, or this Court's prior precedent.

1. Adding Petitioners to the Long List of Exempt Entities Would Not Undercut Any Compelling Interest

In *Hobby Lobby*, the Government asserted that the Mandate was justified by two "very broadly framed interests" in "'public health'" and "'gender equality.'" 134 S. Ct. at 2779. This Court rejected those interests, explaining that RFRA requires "a 'more focused' inquiry" that looks to the strength of the Government's interest in denying a religious exemption for the particular religious plaintiff before the court. *Id.* Here, the Government originally asserted nothing more than the same two overbroad interests. *See* Defs.' Sum. Judgment Br. at 21, 24, *Roman Catholic Archbishop of Wash. v. Sebelius*, No. 13-1441 (D.D.C. Oct. 16, 2013) (Doc. 26). But instead of rejecting those interests in accordance with *Hobby Lobby*, the D.C. Circuit concluded that the "converge[nce]" of these two inadequate interests somehow justified the denial of an exemption for Petitioners. Pet.App.56a. That is wrong for several reasons.

First, the combination of the two overbroad interests rejected in *Hobby Lobby* cannot give rise to an interest sufficiently "focused" to preclude relief for Petitioners. As *Hobby Lobby* explained, the question is not whether the Government has a compelling interest in enforcing its regulatory scheme as a whole, but whether it has a compelling interest in refusing to "'grant[] specific exemptions *to [the] particular religious claimants*'" who have filed suit. 134 S. Ct. at 2779 (citation omitted) (emphasis added). The court below paid only lip service to that inquiry. While extolling the general virtues of

contraception for its broad societal effect on "'public health'" and "'gender equality,'" the court made no real effort to "look to the marginal interest in enforcing the contraceptive mandate in th[is] case[]." *Id.* For example, the court did not attempt to show a lack of access to contraceptive services among Petitioners' plan beneficiaries, nor did it ask whether the Mandate would significantly increase contraception use among women who choose to work for Catholic nonprofits. Instead, the court simply declared that the "evidence justifying the contraceptive coverage requirement" in general "equally supports its application to Plaintiffs." Pet.App.70a. RFRA, however, demands a more exacting inquiry. 134 S. Ct. at 2779.

Second, as *Hobby Lobby* suggested, it is difficult to see how enforcing the Mandate against Petitioners is necessary to protect an interest of the "highest order," given that the Mandate already contains numerous exemptions that leave millions of women without cost-free contraceptive coverage. *See* 134 S. Ct. at 2780-81. This Court has repeatedly emphasized that "'[a] law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.'" *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (citation omitted); *see also Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 433 (2006). And here, the Government has already granted more than an appreciable number of exemptions for "grandfathered" plans and plans sponsored by qualifying "religious employers." *Hobby Lobby*, 134 S. Ct. at 2779-80, 2783.

The panel's attempt to diminish the significance of these exemptions cannot withstand even cursory scrutiny. As this Court noted in *Hobby Lobby*, the "interest" furthered by the expansive grandfathering exemption "is simply the interest of employers in avoiding the inconvenience of amending an existing plan." *Id.* at 2780. Because the Government is willing to exempt millions of individuals for the sake of avoiding mere "inconvenience," it cannot claim a "compelling" need to deny a religious exemption for Petitioners. Indeed the Government itself has tacitly admitted that its interests here are less than compelling: it has taken steps to ensure that grandfathered plans "'comply with a subset of the Affordable Care Act's health reform provisions'" it has deemed "'particularly significant,'" but "the contraception mandate is expressly excluded from this subset." *Id.* (quoting 75 Fed. Reg. 34540 (2010)).

The panel's attempt to explain away the "religious employer" exemption is even less persuasive. As *Hobby Lobby* noted, the Government's decision to fully exempt an artificial category of "religious employers"—regardless of whether they even object to providing contraceptive coverage—is "not easy to square" with its refusal to exempt other religious groups such as Petitioners, who actually do have religious objections. *Id.* at 2777 n.33. The panel offered no persuasive reason for "distinguishing between different religious believers—burdening one while [exempting] the other—when [the Government] may treat both equally by offering both of them the same [exemption]." *Id.* at 2786 (Kennedy, J., concurring). After all, "[e]verything the Government says about [exempt religious employers] applies in equal measure to" Petitioners, who are

equally religious nonprofit groups. *O Centro*, 546 U.S. at 433. [3]

Finally, the panel suggested that the regulations may also be justified by the Government's interest in maintaining a "sustainable system of taxes and subsidies under the ACA." Pet.App.53a (citing *United States v. Lee*, 455 U.S. 252 (1982)). Because the Government did not make this argument, this *sua sponte* assertion conflicts with established law placing the burden to satisfy strict scrutiny "squarely on the Government['s]" shoulders. *O Centro*, 546 U.S. at 429. In any event, *Hobby Lobby* specifically rejected the panel's suggestion, explaining that "[r]ecognizing a religious accommodation under RFRA for particular coverage requirements . . . does not threaten the viability of ACA's comprehensive scheme in the way that recognizing religious objections to particular expenditures from general tax revenues would." 134 S. Ct. at 2783-84.

2. Conscripting the Health Plans of Objecting Religious Nonprofits Is Not the Least Restrictive Means of Providing Free Contraceptive Coverage

Even if the Government had a compelling interest in providing free contraceptive coverage, it would have many less restrictive ways of doing so without

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[3] For example, the Government cannot explain why St. Augustine's School, a Catholic school incorporated as part of the Archdiocese, should qualify for the "religious employer" exemption, while a Catholic school that is part of the separately incorporated Consortium of Catholic Academies should not.

using Petitioners' health plans as the conduit. As *Hobby Lobby* emphasized, the least-restrictive means test is "exceptionally demanding." 134 S. Ct. at 2780. The Government must "*prove*" that its preferred method "is the least restrictive means of furthering a compelling governmental interest"—"mere[] . . . expla[nations]" do not suffice. *Holt*, 135 S. Ct. at 864 (emphasis added). In addition, the Government must show a "'serious, good faith consideration of workable [alternatives].'" *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013).

In *Hobby Lobby*, this Court stated that "[t]he most straightforward way" of providing cost-free contraceptive coverage to women "would be for the Government to assume the cost" of independently providing "contraceptives . . . to any women who are unable to obtain them *under their health-insurance policies* due to their employers' religious objections." 134 S. Ct. at 2780 (emphasis added). Accordingly, Petitioners here identified numerous ways the Government could deliver contraceptive coverage apart from their employer-based health plans. *E.g.*, *infra* p.33-34. These alternatives would require only minor adjustments to existing programs such as Title X, Medicaid, or the ACA exchanges. Though the Government offered *no evidence* of why these alternatives are infeasible, the panel held that the conscription of Petitioners' health plans was necessary to ensure the "seamless[]" provision of coverage to their beneficiaries. Pet.App.68a. In the panel's view, using *any* other means to deliver contraceptive coverage apart from Petitioners' employer-based plans would be unworkable because "[i]mposing even minor added steps would dissuade women from obtaining contraceptives." Pet.App.68a.

That conclusion, upon which the panel's entire analysis hinges, is supported by nothing more than citation to ipse dixit statements in the Federal Register. Pet.App.68a (citing 78 Fed. Reg. at 39,888). In other words, the panel determined that it could force Petitioners to violate their sincerely held religious beliefs based on unsubstantiated assertions that some unknown number of women might otherwise suffer "minor" inconvenience in receiving *free* contraceptive coverage. Thus, in the end, the panel's decision does not rest on the Government's much-touted need to provide free contraceptive coverage, but instead on its desire to conscript religious objectors to help provide the coverage in a more convenient manner.

Whatever may be said for this interest, it cannot possibly be enough to satisfy the "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). The Government may not force religious believers to violate their conscience for the sake of avoiding "minor" inconvenience. Though it is certainly true that "in applying RFRA, 'courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries,'" Pet.App.70a, *Hobby Lobby* was clear that "[n]othing in the text of RFRA or its basic purposes supports giving the Government an entirely free hand to impose burdens on religious exercise so long as those burdens confer a benefit"—however minor—"on other individuals." 134 S. Ct. at 2781 n.37. Thus, just as the Government cannot mandate that "all supermarkets must sell alcohol for the convenience of customers (and thereby exclude Muslims with religious objections from owning supermarkets)," *id.*, it cannot

mandate that all health plans must come with "seamless" access to abortifacient and contraceptive coverage, and thereby exclude Catholic nonprofits from offering health insurance.

II. THE CIRCUITS ARE DIVIDED OVER THE ISSUES PRESENTED

A. The Circuits Are Divided on the Nature of RFRA's "Substantial Burden" Test

As this Court has acknowledged, the "Circuit Courts have divided on whether to enjoin" the regulations that apply to "religious nonprofit organizations," and "[s]uch division is a traditional ground for certiorari." *Wheaton*, 134 S. Ct. at 2807 (citing Sup. Ct. R. 10(a)). This division is based on a fundamental disagreement about the proper test for a "substantial burden" under RFRA.

The Third Circuit has agreed with the D.C. Circuit's decision below that when analyzing substantial burden, courts should focus on the nature of the *actions* religious adherents are forced to take. In stark contrast, the Seventh, Tenth, and Eleventh Circuits have properly focused on the substantiality of the *pressure* placed on religious adherents to act in violation of their beliefs. In these latter circuits, the nature of the compelled action is irrelevant to the substantial-burden analysis, as long as the plaintiff sincerely believes the compelled action is religiously objectionable.

1. In *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (2013) (en banc), *aff'd*, 134 S. Ct. 2751, the Tenth Circuit held that the substantial-burden standard does not allow "an inquiry into the theological merit of the [religious objection] in question," but instead turns solely on "the *intensity*

of the coercion applied by the government to act contrary to [sincere religious] beliefs." *Id.* at 1137. Thus, in the Tenth Circuit, a court's "only task" in applying the substantial-burden test "is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief." *Id.* Crucially, the Tenth Circuit has emphasized that religious believers *themselves* must determine whether a particular act is religiously objectionable on the ground that it would facilitate wrongdoing and thus make them complicit in sin. *Id.* at 1142 ("[T]he question here is not whether the reasonable observer would consider the plaintiffs complicit in an immoral act, but rather how the plaintiffs themselves measure their degree of complicity.").

In *Korte v. Sebelius*, 735 F.3d 654 (2013), the Seventh Circuit expressly "agree[d] with . . . the Tenth Circuit that the substantial-burden test under RFRA focuses primarily on the '*intensity of the coercion* applied by the government to act contrary to [religious] beliefs.'" *Id.* at 683 (quoting *Hobby Lobby*, 723 F.3d at 1137). Thus, in the Seventh Circuit, "the substantial-burden inquiry evaluates the coercive effect of the governmental pressure on the adherent's religious practice and steers well clear of deciding religious questions." *Id.* Like the Tenth Circuit, the Seventh Circuit emphasized that where plaintiffs have a religious objection to taking a particular action because *they* believe it would make them "complicit in a grave moral wrong," courts may not second-guess that religious judgment. *Id.* Accordingly, the test for a substantial burden in the Seventh Circuit is whether the Government has "placed [substantial] pressure on the plaintiffs to

violate their religious beliefs and conform to its regulatory mandate." *Id.*[4]

The Eleventh Circuit has adopted the same test, and has also issued a temporary injunction against the Nonprofit Mandate. *See EWTN*, 756 F.3d 1339. The injunction in *EWTN* was based on the Eleventh Circuit's rule that the Government substantially burdens religious exercise whenever it requires a "religious adherent" to "'participat[e] in an activity prohibited by religion,'" by imposing "significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly." *Id.* at 1344-45 (Pryor, J., concurring) (quoting *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004)). Whether an action is religiously objectionable because it makes the actor "complicit in a grave moral wrong" cannot be second-guessed by courts, but must be left up to the judgment of individual religious believers. *Id.* at 1348. Judge Pryor openly acknowledged that other circuits have recently applied a contrary rule to uphold the Nonprofit Mandate, but he dismissed that rule as "[r]ubbish." *Id.* at 1347.

2. In sharp contrast, the Third Circuit has joined the court below in holding that courts may assess

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[4] The rule of *Korte* was not displaced by the Seventh Circuit's subsequent 2-1 decision in *Notre Dame*, 2015 U.S. App. LEXIS 8234, issued after this Court vacated and remanded the original *Notre Dame* decision. Under applicable Seventh Circuit precedent, "findings of fact and conclusions of law made at the preliminary injunction stage" are "not binding." *Thomas & Betts Corp. v. Panduit Corp.*, 138 F.3d 277, 292-93 (7th Cir. 1998).

whether the actions RFRA claimants are required to take are truly "substantial" in nature, and may second-guess a claimant's sincere belief that taking a particular action would make him complicit in sin.

In *Geneva College v. HHS*, 778 F.3d 422 (3d Cir. 2015), the Third Circuit adopted the same flawed approach as the court below to conclude that the Nonprofit Mandate did not substantially burden the plaintiffs' religious exercise. Explicitly declining to consider "the intensity of the coercion faced by appellees," *id.* at 442, the court stated that it was required to "assess whether the appellees' compliance with the [regulations] does, in fact, . . . make them complicit in the provision of contraceptive coverage." *Id.* at 435. After a lengthy analysis the court ultimately concluded that complying "does not make [the plaintiffs] 'complicit,'" and therefore forcing them to comply does not substantially burden their religious exercise. *Id.* at 438. That pronouncement squarely contradicts the approach of the Tenth, Seventh, and Eleventh Circuits, which have properly held that whether an action impermissibly "facilitates" wrongdoing (and thus makes the actor complicit in sin) is a *religious* judgment that courts may not second-guess. *See Hobby Lobby*, 723 F.3d at 1142; *Korte*, 735 F.3d at 683; *EWTN*, 756 F.3d at 1348. Indeed, the court expressly disagreed with the Seventh Circuit by citing to the *Korte* dissent for the proposition that courts "*may* consider the nature of the action required of the appellees, the connection between that action and the appellees' beliefs, and the extent to which that action interferes with or otherwise affects the appellees' exercise of religion." *Geneva*

Coll., 778 F.3d at 436 (emphasis added) (citing *Korte*, 735 F.3d at 710 (Rovner, J., dissenting)).

3. The fact that the Seventh Circuit's decision in *Korte* and the Tenth Circuit's decision in *Hobby Lobby* involved regulations applicable to for-profit entities in no way diminishes the conflict among the circuits. That conflict arises from the fact that different appellate courts have applied different legal rules to determine whether a regulation imposes a substantial burden on religious exercise. As detailed above, the substantial-burden test applied by the Seventh, Tenth, and Eleventh Circuits evaluates only "the *intensity of the coercion* applied by the government to act contrary to [sincere religious] beliefs." *Hobby Lobby*, 723 F.3d at 1137. In stark contrast, the test applied by the Third and D.C. Circuits considers instead "the nature of the action required of the [religious objector]." *Geneva Coll.*, 778 F.3d at 436. The split in authority is thus squarely presented and in need of resolution.

B. The Circuits Are Divided on Whether the Regulations Satisfy Strict Scrutiny

The decision below also created a split with the Seventh and Tenth Circuits over whether the challenged regulations can satisfy strict scrutiny.

In *Korte*, the Seventh Circuit held that the Government could use several less-restrictive means to provide free contraceptive coverage without using the health plans of religious objectors as a conduit. "The government can provide a 'public option' for contraception insurance; it can give tax incentives to contraception suppliers to provide these medications and services at no cost to consumers; it can give tax incentives to consumers of contraception and

sterilization services. No doubt there are other options." *Korte*, 735 F.3d at 686; *see also Notre Dame*, 2015 U.S. App. LEXIS 8234, at *65-66 (Flaum, J., dissenting) (noting that *Korte*'s strict-scrutiny analysis "remains the law of [the Seventh] circuit," such that the Government "conceded" that "*Korte* dictates the issuance of a preliminary injunction if the court finds a substantial burden"). Here, by contrast, the D.C. Circuit ruled out these alternative means because they would "make the coverage no longer seamless from the beneficiaries' perspective, instead requiring them to take additional steps to obtain contraceptive coverage elsewhere." Pet.App.26a.

The decision below also conflicts with the Tenth Circuit's en banc decision in *Hobby Lobby*, which held that the Government's goal of providing free contraceptive coverage cannot qualify as a "compelling" interest "because the contraceptive-coverage requirement presently does not apply to tens of millions of people" under its various exemptions. 723 F.3d at 1143. The Tenth Circuit reasoned that the regulations "'cannot be regarded as protecting an interest of the highest order when [they] leave[] appreciable damage to that supposedly vital interest unprohibited.'" *Id.* (quoting *O Centro*, 546 U.S. at 547). Here, by contrast, the D.C. Circuit held that "[t]he government's interest in a comprehensive, broadly available system is not undercut by the other exemptions in the ACA, such as the exemptions for religious employers, small employers, and grandfathered plans." Pet.App.71a.

Again, although *Korte* and *Hobby Lobby* involved for-profit regulations, they nonetheless conflict

squarely with the D.C. Circuit's strict-scrutiny analysis here. The Seventh Circuit in *Korte* identified several "less restrictive" ways of providing contraceptive coverage that would also be less restrictive here, because they would require *no action* from nonprofit religious objectors. And the Tenth Circuit's analysis in *Hobby Lobby* equally shows why the Government lacks a "compelling" interest here, in light of the numerous other exemptions the Government has already granted.

III. THIS CASE IS EXCEPTIONALLY IMPORTANT

Certiorari is warranted for the independent reason that the court below has "decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). This case is exceptionally important because it affects the rights of untold thousands of nonprofit religious groups under federal law. Aside from the instant case, there are at least 40 cases pending in the lower courts challenging the Nonprofit Mandate, and courts have granted injunctions in 29 of those cases.[5]

The core question of religious liberty at issue in this case is also exceedingly important. Indeed, this Court has already recognized the importance of this issue by granting extraordinary relief to every entity that has requested it under the All Writs Act. *See Wheaton*, 134 S. Ct. 2806; *Little Sisters of the Poor*, 134 S. Ct. 1022 (2015); *cf. Zubik v. Burwell*, 135 S. Ct. 1544 (2015) (Alito, J., in chambers) (recalling and

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[5] *See* Becket Fund, HHS Mandate Information Central, http://www.becketfund.org/hhsinformationcentral/ (last visited June 18, 2015).

staying the lower court's mandate). Moreover, this Court has twice granted, vacated, and remanded pre-*Hobby Lobby* appellate decisions upholding the Nonprofit Mandate, indicating a "reasonable probability that th[ose] decision[s] . . . rest[] upon a premise" that should be "reject[ed]" in light of subsequent authority. *Lawrence v. Chater*, 516 U.S. 163, 167 (1996); *Univ. of Notre Dame v. Burwell*, 135 S. Ct. 1528 (2015); *Mich. Catholic Conf. v. Burwell* ("*MCC*"), 135 S. Ct. 1914 (2015). Notably, those two now-vacated decisions undergirded much of the panel's reasoning in the case at hand. Pet.App.11a, 26a, 28a, 37-42a, 46a, 50-51a (invoking repeatedly the reasoning of *MCC* and *Notre Dame*).

Finally, certiorari is warranted because "the court of appeals based its decision upon a point expressly reserved or left undecided in prior Supreme Court opinions." Shapiro, et al., Supreme Court Practice § 4.5, at 254 (10th ed. 2013) (citing cases). *Hobby Lobby* expressly reserved the issue presented here. *See* 134 S. Ct. at 2782 & n.40 ("We do not decide today whether [the Nonprofit Mandate] complies with RFRA for purposes of all religious claims.").

IV. THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVING THIS ISSUE

This case presents an ideal vehicle for resolving the lawfulness of the Nonprofit Mandate. The district court issued a final judgment that fully disposed of the parties' claims on cross-motions for summary judgment and the Government's motion to dismiss. Pet.App.211a. As detailed above, the D.C. Circuit squarely addressed both *Hobby Lobby* and the most recent version of the regulations. In doing so, it applied both the substantial-burden and strict-

scrutiny components of RFRA to the Nonprofit Mandate. All of these issues, moreover, were fully aired below, including through two opinions dissenting from the denial of rehearing en banc issued by three judges. Pet.App.231-51a (Brown, J., dissenting); Pet.App.252-78a (Kavanaugh, J., dissenting).

Moreover, Petitioners present the full range of insurance arrangements that may give rise to RFRA claims challenging the Nonprofit Mandate, including insured plans, self-insured plans, and self-insured church plans. Pet.App.12a-15a.

First, a decision here would resolve RFRA objections involving both self-insured and fully insured health plans. The Archdiocese and Thomas Aquinas College have self-insured plans administered by a TPA. Catholic University, by contrast, offers its students and employees the ability to enroll in health plans that are fully insured by outside companies.

Second, the Archdiocese sponsors a "church plan," while the other Petitioners do not. The Government argued in courts below that this makes some difference because church plans are technically exempt from ERISA, even though the contraceptive-coverage regulations are not solely based on ERISA and do not exempt church plans. *E.g.*, 26 C.F.R. §§ 54.9815-2713, 54.9815-2713A, 54.9815-2713AT. A decision here would resolve that issue.

Third, like many dioceses, the Archdiocese has a self-insured plan that includes not only its own employees, but also the employees of its religious affiliates. *Supra* p.8. Although the Archdiocese is exempt from the self-certification or notification

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requirement due to its status as a "religious employer," its participating affiliates are not exempt: they are forced to submit the "self-certification" or "notification" to the Archdiocese's TPA, which in turn enables the TPA to provide their employees with the objectionable coverage as part of the Archdiocese's self-insured health plan. A decision here would thus resolve the legality of the Nonprofit Mandate as applied to this arrangement.

This case, therefore, would allow this Court to definitively resolve the application of the Nonprofit Mandate to the numerous types of organizations and insurance arrangements that are subject to it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 19, 2015

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 8, 2014 Decided November 14, 2014

No. 13-5368

PRIESTS FOR LIFE, ET AL.,
APPELLANTS

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,
APPELLEES

Consolidated with 13-5371, 14-5021

Appeals from the United States District Court
for the District of Columbia
(No. 1:13-cv-01261)
(No. 1:13-cv-01441)

Robert J. Muise argued the cause for appellants/cross-appellees Priests For Life, et al. *Noel J. Francisco* argued the cause for appellants/cross-appellees Roman Catholic Archbishop of Washington,

et al. With them on the briefs were *Eric Dreiband* and *David Yerushalmi*.

Kimberlee Wood Colby was on the brief for *amici curiae* The Association of Gospel Rescue Missions, et al. in support of cross-appellants/cross-appellees.

Mark B. Stern, Attorney, U.S. Department of Justice, argued the cause for appellees/cross-appellants. With him on the brief were *Stuart F. Delery*, Assistant Attorney General, *Ronald C. Machen Jr.*, U.S. Attorney, *Beth S. Brinkmann*, Deputy Assistant Attorney General, and *Alisa B. Klein* and *Adam C. Jed*, Attorneys.

Martha Jane Perkins was on the brief for amici curiae National Health Law Program, et al. in support of appellees/cross-appellants.

Marcia D. Greenberger and *Charles E. Davidow* were on the brief for *amici curiae* The National Women's Law Center, et al. in support of appellees/cross-appellants.

Ayesha N. Khan was on the brief for *amici curiae* Americans United for Separation of Church and State, et al. in support of appellees/cross-appellants.

Before: ROGERS, PILLARD AND WILKINS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* PILLARD.

PILLARD, *Circuit Judge*: These consolidated cases present the question whether a regulatory accommodation for religious nonprofit organizations that permits them to opt out of the contraceptive coverage requirement under the Patient Protection and Affordable Care Act ("ACA"), 42 U.S.C. § 300gg-13(a)(4), itself imposes an unjustified substantial

burden on Plaintiffs' religious exercise in violation of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq*. Plaintiffs' principal claim is that the accommodation does not go far enough. They believe that, even if they opted out, they would still play a role in facilitating contraceptive coverage. They view the regulation as thereby substantially burdening their religious exercise by involving them in what the Plaintiffs and their faith call "scandal," i.e., leading others to do evil. Plaintiffs claim that the government lacks a compelling interest in requiring them to use the specific accommodation the regulations authorize, making the burden unjustified and unlawful. They contend that RFRA gives them a right to exclude contraceptive coverage from their employees' and students' plans without notice, and requires that the government be enjoined from implementing the contraceptive coverage requirement.

* * *

As a consequence of a period of wage controls after World War II during which employers created new fringe benefits, the majority of people in the United States with health insurance receive it under plans their employers arrange through the private market. Congress chose in the ACA not to displace that basic system. It sought instead to expand the number of Americans insured and to improve and subsidize health insurance coverage, in part by building on the market-based system of employer-sponsored private health insurance already in place. The contraceptive coverage requirement and accommodation operate through that system.

The regulations implementing the ACA and its Women's Health Amendment impose a range of standard requirements on group health plans, including that they cover contraceptive services prescribed by a health care provider without imposing any cost sharing on the patient. The contraceptive coverage requirement derives from the ACA's prioritization of preventive care, and from Congress' recognition that such care has often been modeled on men's health needs and thus left women underinsured. As discussed below, Congress included the Women's Health Amendment in the ACA to remedy the problem that women were paying significantly more out of pocket for preventive care and thus often failed to seek preventive services, including consultations, prescriptions, and procedures relating to contraception. The medical evidence prompting the contraceptive coverage requirement showed that even minor obstacles to obtaining contraception led to more unplanned and risky pregnancies, with attendant adverse effects on women and their families.

Some employers, including the Catholic nonprofits in this case, oppose contraception on religious grounds. The Catholic Church teaches that contraception violates God's design because the natural and non-sinful purpose of sex is to conceive a child within a marriage: Plaintiff Priests for Life, quoting the Papal Encyclical *Humanae Vitae*, declares that "'any action which either before, at the moment of, or after sexual intercourse, is specifically intended to prevent procreation, whether as an end or as a means'—including contraception and sterilization—is a grave sin." J.A. 49. In the view of the Catholic Church expressed through *Humanae*

Vitae, contraception enables the separation of sex from reverence for the sexual partner, the understanding that sex makes children, and the imperative of deep commitment to marriage and family.

The Catholic Church itself is exempt from the contraceptive coverage requirement, but Catholic nonprofits have a long and broad history of service that goes far beyond worship or proselytizing. Nationally, Catholic hospitals, clinics, universities, schools, and social services groups provide many services that are not inherently religious. Catholic-identified nonprofits employ and enroll as students millions of adults, not all of whom are co-religionists or share the Catholic Church's religious opposition to contraception.

Faced with an employer-based health insurance system, forceful impetus to require coverage of contraceptive services, and religious opposition by some employers to contraception, the government sought to accommodate religious objections. As detailed below, the ACA's implementing regulations allow religious nonprofits to opt out of including contraception in the coverage they arrange for their employees and students. The regulations assure, however, that the legally mandated coverage is in place to seamlessly provide contraceptive services to women who want them, for whom they are medically appropriate, and who personally have no objection to using them.

The regulatory opt out works simply: A religious organization that objects on religious grounds to including coverage for contraception in its health plan may so inform either the entity that issues or

administers its group health plan or the Department of Health and Human Services. Delivery of the requisite notice extinguishes the religious organization's obligation to contract, arrange, pay, or refer for any coverage that includes contraception. The regulations then require group health plan insurers or administrators to offer separate coverage for contraceptive services directly to insured women who want them, and to inform beneficiaries that the objecting employer has no role in facilitating that coverage.

Plaintiffs, the Roman Catholic Archbishop of Washington and nonprofits affiliated with the Catholic Church, arrange for group health coverage for their employees and students. Plaintiffs oppose the ACA's contraceptive coverage requirement on religious grounds and do not want to provide the requisite contraceptive coverage. Instead of taking advantage of the accommodation, Plaintiffs filed suit to challenge it as a violation of their religious rights.

Plaintiffs' principal claim arises under RFRA. Congress enacted RFRA in response to the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), that the Free Exercise Clause of the First Amendment "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability." *Id.* at 879 (internal quotation marks omitted). Congress sought to reinstate as a statutory matter the pre-*Smith* free exercise standard. Under RFRA, the federal government may not "substantially burden" a person's religious exercise—even where the burden results from a religiously neutral, generally applicable law that is constitutionally valid under

Smith—unless the imposition of such a burden is the least restrictive means to serve a compelling governmental interest.

The contraceptive coverage opt-out mechanism substantially burdens Plaintiffs' religious exercise, Plaintiffs contend, by failing to extricate them from providing, paying for, or facilitating access to contraception. In particular, they assert that the notice they submit in requesting accommodation is a "trigger" that activates substitute coverage, and that the government will "hijack" their health plans and use them as "conduits" for providing contraceptive coverage to their employees and students. Plaintiffs dispute that the government has any compelling interest in obliging them to give notice of their wish to take advantage of the accommodation. And they argue that the government has failed to show that the notice requirement is the least restrictive means of serving any such interest.

We conclude that the challenged regulations do not impose a substantial burden on Plaintiffs' religious exercise under RFRA. All Plaintiffs must do to opt out is express what they believe and seek what they want via a letter or two-page form. That bit of paperwork is more straightforward and minimal than many that are staples of nonprofit organizations' compliance with law in the modern administrative state. Religious nonprofits that opt out are excused from playing any role in the provision of contraceptive services, and they remain free to condemn contraception in the clearest terms. The ACA shifts to health insurers and administrators the obligation to pay for and provide contraceptive

coverage for insured persons who would otherwise lose it as a result of the religious accommodation.

Even if, as Plaintiffs aver, we must take as dispositive their conviction that the accommodation involves them in providing contraception in a manner that substantially burdens their religious exercise, we would sustain the challenged regulations. A confluence of compelling interests supports maintaining seamless application of contraceptive coverage to insured individuals even as Plaintiffs are excused from providing it. That coverage offers adults and children the benefits of planning for healthy births and avoiding unwanted pregnancy, and it promotes preventive care that is as responsive to women's health needs as it is to men's. The accommodation requires as little as it can from the objectors while still serving the government's compelling interests. Because the regulatory opt-out mechanism is the least restrictive means to serve compelling governmental interests, it is fully consistent with Plaintiffs' rights under RFRA. We also find no merit in Plaintiffs' additional claims under the Constitution and the Administrative Procedure Act.

I. Background

A. The ACA & Accommodation

The ACA requires group health plans, including both insured and self-insured employer-based plans, to include minimum coverage for a variety of preventive health services without imposing cost-

sharing requirements on the covered beneficiary.[1] 42 U.S.C. § 300gg-13(a); *see also id.* § 300gg-91(a) (defining "group health plan"); 45 C.F.R. § 147.131(c)(2)(ii) (cost-sharing includes copayments, coinsurance, and deductibles). In view of the greater preventive health care costs borne by women, the Women's Health Amendment in the ACA specifically requires coverage for women of "such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration." 42 U.S.C. § 300gg-13(a)(4).

To determine which preventive services should be required, the Health Resources and Services Administration ("HRSA"), a component of HHS, commissioned a study from the independent Institute of Medicine ("IOM" or "Institute"). The Institute is an arm of the National Academy of Sciences established in 1970 to inform health policy with available scientific information. In reliance on the work of the Institute, HRSA established guidelines for women's preventive services that include any "[FDA] approved contraceptive methods, sterilization procedures, and patient education and counseling." Health Resources & Servs. Admin., *Women's Preventive Services Guidelines*,

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[1] An employer "self-insures" if it bears the financial risk of paying its employees' health insurance claims (as opposed to contracting with an insurance company to provide coverage and bear the associated financial risk). Many "self-insured" employers hire third-party administrators ("TPAs") to perform administrative functions, such as developing provider networks and processing claims. *See generally* Cong. Budget Office, *Key Issues in Analyzing Major Health Insurance Proposals* 6 (2008).

http://www.hrsa.gov/womensguidelines/, *quoted in* 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012).

The three agencies responsible for the ACA's implementation—the Department of Health and Human Services, the Department of Labor, and the Department of the Treasury (collectively, the "Departments")—issued regulations requiring coverage of all preventive services contained in the HRSA guidelines, including contraceptive services. *See* 45 C.F.R. § 147.130(a)(1)(iv) (HHS); 29 C.F.R. § 2590.715-2713(a)(1)(iv) (Labor); 26 C.F.R. § 54.9815-2713(a)(1)(iv) (Treasury). The Departments determined that contraceptives prevent unintended pregnancies and the negative health risks associated with such pregnancies; they "have medical benefits for women who are contraindicated for pregnancy," and they offer "demonstrated preventive health benefits . . . relating to conditions other than pregnancy . . . ." 77 Fed. Reg. at 8,727. Inadequate coverage for women not only fails to protect women's health, but "places women in the workforce at a disadvantage compared to their male co-workers." *Id.* at 8,728. Providing contraceptive coverage within the preventive-care package, the Departments observed, supports the equal ability of women to be "healthy and productive members of the job force." *Id.* Because of the importance of such coverage, and because "[r]esearch . . . shows that cost sharing can be a significant barrier to effective contraception," the Departments included contraceptive coverage among the services to be provided without cost sharing. *Id.*

Objections by religious nonprofits to the use of contraception, and to arranging health insurance for

their employees that covers contraceptive services, prompted the Departments to create two avenues for religious organizations to exclude themselves from any obligation to provide such coverage. Those avenues track a longstanding and familiar distinction between houses of worship (e.g., temples, mosques, or churches) and religious nonprofits (e.g., schools, hospitals, or social service agencies with a religious mission or affiliation). First, in order to "respect[] the unique relationship between a house of worship and its employees in ministerial positions," the Departments categorically exempted "religious employers," defined as churches or the exclusively religious activities of any religious order, from the contraceptive coverage requirement.[2] 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011); *see* 45 C.F.R. § 147.131(a). Second, the Departments created a mechanism for nonprofit "eligible organizations," i.e., groups that are not houses of worship but nonetheless present themselves as having a religious character, to opt out of having to "contract, arrange, pay, or refer for [contraceptive] coverage." 78 Fed. Reg. 39,870, 39,871 (July 2, 2013). This opt-out mechanism was designed to dissociate the objecting organizations from contraceptive coverage while ensuring that the individuals covered under those organizations' health plans—people not fairly

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[2] An organization qualifies as a "religious employer" under the regulations if it is "organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended." 45 C.F.R. § 147.131(a). Those provisions, in turn, refer to "churches, their integrated auxiliaries, and conventions or associations of churches" and "the exclusively religious activities of any religious order." 26 U.S.C. § 6033(a)(3)(A)(i), (iii).

presumed to share the organizations' opposition to contraception or to be co-religionists—could obtain coverage for contraceptive services directly through separate plans from the same plan providers. *See id.* at 39,874. Plaintiffs challenge this second mechanism, which the regulations refer to as the "accommodation."

The government designed the accommodation to avoid encumbering Plaintiffs' sincere religious belief that providing, paying for, or facilitating insurance coverage for contraceptives violates their religion, but the government sought at the same time to preserve unhindered access to contraceptives for insured individuals who use them. Many religiously affiliated educational institutions, hospitals, and social-service organizations have taken advantage of the accommodation, and courts of appeals have uniformly sustained it against challenges under RFRA and the Constitution. *See Mich. Catholic Conf. & Catholic Family Servs. v. Burwell*, 755 F.3d 372 (6th Cir. 2014); *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547 (7th Cir. 2014) *petition for cert. filed* (Oct. 3, 2014) (No. 13-3853).

B. The Plaintiff Nonprofits Offer Health Insurance in Various Ways

Plaintiffs are eleven Catholic organizations that employ both Catholics and non-Catholics and provide a range of spiritual and charitable services in the Washington, D.C. area.[3] They fall into four categories

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[3] Father Frank Pavone, Alveda King, and Janet Morana, employees of Plaintiff Priests for Life, are also individually Plaintiffs in this action. We refer to them, along with the

that differ in ways that affect how the accommodation applies to them, and that are thus relevant to some aspects of our analysis.

First, the Roman Catholic Archbishop of Washington (the "Archdiocese"), a corporation sole, is part of the Catholic Church. It provides pastoral care and spiritual guidance to nearly 600,000 Catholics. It is undisputed that the Archdiocese itself is a religious employer and thus is categorically exempt from the requirement to include coverage for contraceptive services for its employees in its self-insured health plan. The Archdiocese operates a self-insured health plan that is considered a "church plan." Church plans are exempt from the Employee Retirement Income Security Act of 1974 ("ERISA"), which regulates private, employer-sponsored benefit plans, including health insurance plans. *See* 29 U.S.C. § 1002(33) (defining "church plan"); id. at § 1003(b)(2) (exempting church plans from ERISA); *see generally id.* § 1001 *et seq.* (governing employee benefit plans). The ACA amended ERISA by establishing new requirements for large group health plans and insurers, but the church's provision of benefits to its employees via its church plan is exempt from ERISA, which distinguishes the Archdiocese's claims here from those of the other Plaintiffs. The Archdiocese need not submit any written notice in order to be exempt, and the employees of the Archdiocese are not entitled to contraceptive coverage under the ACA. The Archdiocese nonetheless participates as a Plaintiff in this case in its role as the sponsor of the church plan

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organization, collectively as "Priests for Life" or the "*Priests for Life* Plaintiffs."

that some of the other Plaintiffs also use to provide insurance to their employees—a role that the Archdiocese contends makes it complicit in providing them with contraceptive coverage.

The remaining Plaintiffs are all religious nonprofits. It is undisputed that, under the government's regulations, each is eligible for the accommodation, but not the exemption extended to houses of worship.

Comprising the second of the four categories are the so-called "church-plan Plaintiffs," nonprofits affiliated with the Archdiocese that provide educational, housing, and social services to the community and arrange for health insurance coverage for their employees through the Archdiocese's self-insured plan.[4]

Plaintiff Thomas Aquinas College falls under a third category. It also self-insures. It offers its employees health insurance coverage through an organization called the RETA trust, which oversees an ERISA-covered plan set up by the Catholic bishops of California and run by a third-party administrator ("TPA"). The parties agree that the College's plan is not exempt from ERISA as a church plan.

In the fourth category are those Plaintiffs that provide insurance coverage through group health

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[4] The church-plan Plaintiffs are the Consortium of Catholic Academies of the Archdiocese of Washington, Archbishop Carroll High School, Inc., Don Bosco Cristo Rey High School of the Archdiocese of Washington, Inc., Mary of Nazareth Roman Catholic Elementary School, Inc., Catholic Charities of the Archdiocese of Washington, Inc., Victory Housing, Inc., and the Catholic Information Center, Inc.

insurance plans they negotiate with private insurance companies. Catholic University of America offers its students and employees health insurance through two separate group insurance plans offered by AETNA and United Healthcare. Priests for Life, a religious nonprofit that encourages clergy to emphasize the value and inviolability of human life, also provides its employees with health insurance through a group insurance plan offered by United Healthcare.

It is undisputed that Plaintiffs all sincerely believe that life begins at conception and that contraception is contrary to Catholic tenets.[5] Priests for Life, for example, was founded to spread the Gospel of Life, which "affirms and promotes the culture of life and actively opposes and rejects the culture of death." Pls.' Br. 11. Catholic doctrine prohibits "impermissible cooperation with evil," and thus opposes providing access to "contraceptives, sterilization, and abortion-inducing products," which the Church views as "immoral regardless of their cost." *Id.* at 12. The specific acts to which Plaintiffs object are "provid[ing], pay[ing] for, and/or facilitat[ing] access to contraception," any of which they believe would violate the Catholic Church's teachings. *Id.* at 15.

In the past, in accordance with their religious beliefs, Plaintiffs have offered health care coverage to their employees [6] that excluded coverage for

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[5] For ease of reference, we refer to contraception, sterilization, and related counseling services as "contraception" or "contraceptive services."

[6] Throughout this opinion we discuss Plaintiffs' "employees." We use this term to refer to all individuals covered by Plaintiffs'

"abortion-inducing products, contraception [except when used for non-contraceptive purposes], sterilization, or related counseling." *Id.* at 16. They structured the coverage in a variety of ways, including through self-insured health plans and group health plans, which they directed to exclude all contraceptive services. Plaintiffs object to the contraceptive coverage requirement and the accommodation's opt-out mechanism because, they assert, the accommodation fails adequately to dissociate them from the provision of contraceptive coverage and, by making them complicit with evil, substantially burdens their religious exercise in violation of RFRA. In particular, they contend that the regulations, by requiring the plans or TPAs with which they contract to provide the coverage, effectively require Plaintiffs to facilitate it.

C. Procedural History

Plaintiffs brought two separate suits that proceeded on parallel tracks in district court. The *Priests for Life* Plaintiffs filed their complaint in August 2013 and promptly moved for a preliminary injunction. They challenged the contraceptive coverage requirement and the accommodation as an unjustified substantial burden on their religious exercise in violation of RFRA and raised a variety of constitutional challenges under the Speech and Religion Clauses of the First Amendment and the Equal Protection Clause of the Fifth Amendment.

The district court considered Plaintiffs' request for a preliminary injunction together with the merits,

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insurance plans, including employees, students, and other beneficiaries, such as covered dependents.

granted the government's motion to dismiss the complaint for failure to state a claim, and denied as moot the parties' cross-motions for summary judgment. Reasoning that "[t]he accommodation specifically ensures that provision of contraceptive services is entirely the activity of a third party—namely the issuer—and Priests for Life plays no role in that activity," the court held that the *Priests for Life* Plaintiffs failed to show a substantial burden on their religious exercise. *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 7 F. Supp. 3d 88, 102 (D.D.C. 2013). The court also rejected each of Priests for Life's constitutional claims. *Id.* at 104-111.

The remaining Plaintiffs—the Archdiocese, Thomas Aquinas College, Catholic University of America, and the church-plan Plaintiffs (referred to collectively as the "*RCAW* Plaintiffs")—filed their complaint and moved for a preliminary injunction in September 2013, challenging the accommodation under RFRA and the First Amendment. The *RCAW* Plaintiffs further claimed that the government's implementation of the regulations violates the APA, including by adopting an erroneous interpretation of the "religious employer" categorical exemption that precludes the church-plan Plaintiffs from qualifying for it. They also claimed in supplemental briefing that the interim final rule was invalidly promulgated without notice and comment.[7] The *RCAW* case was assigned to a different district judge who also consolidated proceedings on the preliminary injunction and the merits, but who granted in part

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[7] The *RCAW* Plaintiffs abandoned on appeal their other APA claims.

and denied in part the parties' cross-motions for summary judgment.

The court rejected Catholic University's RFRA claim and granted that of Thomas Aquinas College. *Roman Catholic Archbishop of Wash. v. Sebelius (RCAW)*, No. 13-1441, 2013 WL 6729515, at *15-24 (D.D.C. Dec. 20, 2013). The court held that the accommodation did not impose a substantial burden on Catholic University's religious exercise because "the accommodation effectively severs an organization that offers its employees or students an insured group health plan from participation in the provision of the contraceptive coverage." *Id.* at *15. The court determined that Thomas Aquinas College was entitled to summary judgment on its RFRA claim, however, because, as the court understood the regulations, "a series of duties and obligations" constituting a substantial burden could fall on the self-insured College if, after the College opted out, its current TPA were to decline to serve as the plan administrator for purposes of the contraceptive coverage requirement.[8] *Id.* at *24. The court granted the government's cross-motion for summary

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[8] The court also granted summary judgment to both Thomas Aquinas College and the church-plan Plaintiffs on their challenge to the so-called "non-interference" regulation, which prevented a self-insured organization from seeking to "influence" a TPA. The court concluded that the regulation imposed an unconstitutional content-based limitation that "directly burdens, chills, and inhibits" Plaintiffs' free speech. *RCAW*, 2013 WL 6729515, at *37-38. That regulation has since been rescinded, 79 Fed. Reg. 51,092, 51,095 (Aug. 27, 2014), rendering that claim moot.

judgment on the other constitutional and APA claims.[9]

All Plaintiffs appealed and sought injunctions pending appeal, while the government cross-appealed the rulings in favor of the *RCAW* Plaintiffs. We consolidated the appeals and granted an injunction pending appeal.

II. Standard of Review

Whether claims are decided on a motion to dismiss or for summary judgment, we review the district courts' determinations *de novo*. *Rudder v. Williams*, 666 F.3d 790, 794 (D.C. Cir. 2012); *Potter v. District of Columbia*, 558 F.3d 542, 547 (D.C. Cir. 2009). A motion to dismiss for failure to state a claim should be granted if the complaint does not contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

Summary judgment is appropriate only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty*

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[9] The district court believed that, because the Archdiocese is exempt from the contraceptive coverage requirement, it was "not joined in" the RFRA claim, *RCAW*, 2013 WL 6729515, at *8, and that the church-plan Plaintiffs lacked standing to bring such a claim, *id.* at *24-27. The court also concluded that some Plaintiffs lacked standing to raise some of the other claims alleged in the complaint. *See, e.g., id.* at *43-44, 47. To the extent necessary to establish this Court's subject matter jurisdiction, we address standing below.

Lobby, Inc., 477 U.S. 242, 247-48 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

III. Standing

The *RCAW* district court concluded that the church-plan Plaintiffs lack standing to challenge the accommodation. 2013 WL 6729515, at *26. The government does not press that issue on appeal, but we have an independent obligation to confirm our jurisdiction. *See Ams. for Safe Access v. DEA*, 706 F.3d 438, 442 (D.C. Cir. 2013). "[I]n determining whether plaintiffs have standing, we must assume that on the merits they would be successful in their claims." *Muir v. Navy Fed. Credit Union*, 529 F.3d 1100, 1106 (D.C. Cir. 2008) (internal alterations and quotation marks omitted).

Plaintiffs contend that they are injured by the challenged regulations because they are forced to choose among options, each of which, they argue, would require them to violate their sincerely held religious beliefs: They may either directly provide contraceptive coverage to their employees, or pay onerous penalties for failing to include contraceptive coverage in their plans. The government has offered them a third option in the form of the accommodation: exclude contraceptive coverage from their plans. They object to that, too, however, because if they exclude contraceptive coverage from their plans, the regulations require someone else to provide it in a way that they contend amounts to their facilitation of the objected-to coverage. Plaintiffs further claim that they are faced with those impossible choices as a result of the ACA regulations, and that a ruling from this Court invalidating those regulations would redress their injury. As a general matter, the

government does not contest that Plaintiffs' claimed injury is legally cognizable and concrete.

In successfully challenging the church-plan Plaintiffs' standing in district court, the government argued that it lacks authority to impose on those particular Plaintiffs the harm of which they complain and that they thus cannot allege sufficient injury to support standing. Specifically, the government contended that it could not require a TPA—the firm the Archdiocese hired to administer its plan and process its claims—to provide contraceptive coverage to the church-plan Plaintiffs' employees. [10] In those circumstances, the government contended, a legal victory in this case would change nothing.

Whether or not the obligation is enforceable, however, it is undisputed that, if the church-plan Plaintiffs want a religious accommodation, they are legally required to request it through the opt-out process. Like all the other Plaintiffs, the church-plan Plaintiffs allege that their religious beliefs forbid them from availing themselves of the accommodation because doing so would render them complicit in a

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[10] That is because church plans (such as the Archdiocese's) are exempt from ERISA, 29 U.S.C. § 1003(b)(2), and ERISA is the only vehicle through which the government may enforce a TPA's obligation to provide contraception coverage under the accommodation. *See* 29 C.F.R. § 2510.3-16(b). The government claimed that, in light of its lack of a governmental enforcement mechanism, the Archdiocese's TPA could not be expected to provide the requisite coverage to the church-plan Plaintiffs' employees. As a result of that regulatory loophole, the district court held that the church-plan Plaintiffs are not injured by either the contraceptive coverage requirement or the requirement that they complete the self-certification as a condition of opting out.

scheme aimed at providing contraceptive coverage. They thus contend that the burden on their religious exercise is the same as the burden on any Plaintiff whose TPA or insurer provides coverage according to the regulations. Their burdens are equally concrete, even though the asserted burden on the other Plaintiffs is backed by a threat of enforcement against a potentially recalcitrant TPA, whereas the church-plan Plaintiffs' asserted burden is not. Because the regulations require the church-plan Plaintiffs to take an action that they contend substantially burdens their religious exercise, they, like the other Plaintiffs, have alleged a sufficiently concrete injury.[11] *See In re Navy Chaplaincy*, 697 F.3d 1171, 1176-77 (D.C. Cir. 2012) (holding that "policies and procedures" that plaintiff claimed produced future injury on the basis of religious belief were sufficient to confer standing).

The Archdiocese presents a distinct standing question because it is completely exempt from the challenged regulation. It contends that it has a RFRA claim because it sponsors the self-insured plan in which the church-plan Plaintiffs participate. It argues that, despite its own exemption, it faces an

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[11] Two of the church-plan Plaintiffs, Catholic Information Center and Don Bosco, have fewer than 50 employees and therefore are not subject to the ACA's requirement that employers provide their employees with health insurance. *See* 26 U.S.C. § 4980H(a), (c)(2). We need not address whether that affects their standing, however, because the presence of other Plaintiffs with standing is sufficient to satisfy Article III. *See, e.g., Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) ("[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement.").

impossible choice of either sponsoring a plan that will provide the employees of the church-plan Plaintiffs with access to contraceptive services, or no longer extending its plan to those entities, leaving them exposed to penalties if they do not contract with another provider that will provide the coverage. The first option, in its view, substantially burdens its sincerely held religious beliefs in violation of RFRA, and the second option allows the government to interfere with what it casts as its internal operations, in violation of the Religion Clauses of the First Amendment. Our holding that the church-plan Plaintiffs have standing also supports the Archdiocese's claim of redressable injury adequate to support its standing to sue.[12]

IV. RFRA Claim

The claim that lies at the heart of this case is Plaintiffs' RFRA challenge to the accommodation. RFRA provides that the federal government may not "substantially burden" a person's religious exercise, even if the burden results from a rule that applies generally to religious and non-religious persons alike, unless the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. In other words, if the law's requirements do not amount to a substantial burden under RFRA, that is the end

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[12] Because the Archdiocese's RFRA claim derives from its sponsorship of a plan that also insures employees of the church-plan Plaintiffs, the Archdiocese's claim rises and falls with that of the church-plan Plaintiffs and so is not separately analyzed below.

of the matter. Where a law does impose a substantial burden, Congress has instructed that "we must return to 'the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).'" *Kaemmerling v. Lappin*, 553 F.3d 669, 677 (D.C. Cir. 2008) (quoting 42 U.S.C. § 2000bb(b)(1)). Congress directly referenced and incorporated the legal standards the Supreme Court used in its pre-*Smith* line of cases in RFRA. Constitutional free exercise cases that predate *Smith* accordingly remain instructive when determining RFRA's requirements. *See id.* at 678-80.

We pause at the outset to make some general observations about the contours of Plaintiffs' claims. First, Plaintiffs' case is significantly different from the recent, successful Supreme Court challenge brought by for-profit, closely-held corporations in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). There, the Court concluded that, *in the absence of any accommodation*, the contraceptive coverage requirement imposed a substantial burden on the religious exercise of for-profit corporations because those plaintiffs were required either to provide health insurance coverage that included contraceptive benefits in violation of their religious beliefs, or to pay substantial fines. *Id.* at 2775-76. A critical difference here is that the regulations already give Plaintiffs the third choice that the for-profit corporate plaintiffs in *Hobby Lobby* sought: They can avoid both providing the contraceptive coverage and the penalties associated with non-compliance by opting out of the contraceptive coverage requirement altogether.

Plaintiffs contend that, even with the choice to opt out, the regulations leave them with the same "Hobson's choice" as the for-profit corporations in *Hobby Lobby*. In their view, availing themselves of the accommodation requires them to violate their sincerely held religious beliefs just as surely as would providing contraceptive coverage to their employees. But the opt out already available to Plaintiffs is precisely the alternative the Supreme Court considered in *Hobby Lobby* and assumed would not impinge on the for-profit corporations' religious beliefs even as it fully served the government's interest.[13] *Id.* at 2782.

This case also differs from *Hobby Lobby* in another crucial respect: In holding that Hobby Lobby must be accommodated, the Supreme Court repeatedly underscored that the effect on women's contraceptive coverage of extending the accommodation to the complaining businesses "would be precisely zero." *Id.* at 2760; *see also id.* at 2781 n.37 ("Our decision in these cases need not result in any detrimental effect

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[13] Plaintiffs also have a fourth option under the ACA: ceasing to offer health insurance as an employment benefit, and instead paying the shared responsibility assessment and leaving the employees to obtain subsidized health care coverage on a health insurance exchange. *See* 26 U.S.C. § 4980H. That is permitted by the Act and regulations and might well be less expensive to employers than contributing to employee health benefits. Plaintiffs, however, contend that declining to arrange health insurance benefits for their employees also would injure them because it would be inconsistent with their religious mission and would deny them the recruitment and retention benefits of providing tax-advantaged health care coverage to their employees. *See* Oral Arg. Tr. at 19:5-15; *see also* Pls.' R. Br. 21 n.9; *see generally Hobby Lobby*, 134 S. Ct. at 2776-77 & n. 32. The government has not pressed the point here.

on any third party."); *id.* at 2782 (extending accommodation to Hobby Lobby would "protect the asserted needs of women as effectively" as not doing so). Justice Kennedy in his concurrence emphasized the same point, that extending the accommodation to for-profit corporations "equally furthers the Government's interest but does not impinge on the plaintiffs' religious beliefs." *Id.* at 2786. The relief Plaintiffs seek here, in contrast, would hinder women's access to contraception. It would either deny the contraceptive coverage altogether or, at a minimum, make the coverage no longer seamless from the beneficiaries' perspective, instead requiring them to take additional steps to obtain contraceptive coverage elsewhere.

Second, Plaintiffs' claim is extraordinary and potentially far reaching: Plaintiffs argue that a religious accommodation, designed to permit them to free themselves entirely from the contraceptive coverage requirement, itself imposes a substantial burden. As the Seventh Circuit put the point, "[w]hat makes this case and others like it involving the contraception exemption paradoxical and virtually unprecedented is that the beneficiaries of the religious exemption are claiming that the exemption process itself imposes a substantial burden on their religious faiths." *Notre Dame*, 743 F.3d at 557. As the *Notre Dame* court noted, it is analogous to a religious conscientious objector to a military draft claiming that the act of identifying himself as such on his Selective Service card constitutes a substantial burden because that identification would then "trigger" the draft of a fellow selective service registrant in his place and

thereby implicate the objector in facilitating war. *Id.* at 556.

Religious objectors do not suffer substantial burdens under RFRA where the only harm to them is that they sincerely feel aggrieved by their inability to prevent what other people would do to fulfill regulatory objectives after they opt out. *Cf. id.* at 556. They have no RFRA right to be free from the unease, or even anguish, of knowing that third parties are legally privileged or obligated to act in ways their religion abhors. *See generally Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988) (distinguishing between right to avoid being "coerced . . . into violating their religious beliefs" and the lack of right to pursue "spiritual fulfillment according to their own religious beliefs"). "Government simply could not operate if it were required to satisfy every citizen's religious needs and desires." *Id.* at 453.

We now turn to the substance of Plaintiffs' RFRA claims. We first consider their contention that the accommodation imposes a substantial burden on their religious exercise that is cognizable under RFRA. We then analyze the government's claim that any such burden is justified under RFRA because it could not be made any lighter and still serve the government's compelling interests.

A. The Accommodation Does Not Substantially Burden Plaintiffs' Religious Exercise

In our cosmopolitan nation with its people of diverse convictions, freedom of religious exercise is protected yet not absolute. That is true under the heightened standard Congress enacted in RFRA as

well as the constitutional baseline set by the Free Exercise Clause. The limitations that prove determinative here are that only "substantial" burdens on religious exercise require accommodation, and that an adherent may not use a religious objection to dictate the conduct of the government or of third parties. This Court explained in *Kaemmerling* that "[a] substantial burden exists when government action puts 'substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" 553 F.3d at 678 (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981)). A burden does not rise to the level of being substantial when it places "[a]n inconsequential or *de minimis* burden" on an adherent's religious exercise. *Id.* (citing *Levitan v. Ashcroft*, 281 F.3d 1313, 1320-21 (D.C. Cir. 2002)). An asserted burden is also not an actionable substantial burden when it falls on a third party, not the religious adherent. *See, e.g.*, *Bowen v. Roy*, 476 U.S. 693, 699 (1986).

Plaintiffs' objection rests on their religious belief that "they may not provide, pay for, and/or facilitate access to contraception, sterilization, abortion, or related counseling in a manner that violates the teachings of the Catholic Church." Pls.' Br. 15. But the regulations do not compel them to do any of those things. Instead, the accommodation provides Plaintiffs a simple, one-step form for opting out and washing their hands of any involvement in providing insurance coverage for contraceptive services.

1. The Court Must Evaluate Assertions of Substantial Burden

The sincerity of Plaintiffs' religious commitment is not at issue in this litigation. Plaintiffs are correct

that they—and not this Court—determine what religious observance their faith commands. There is no dispute about the sincerity of Plaintiffs' belief that providing, paying for, or facilitating access to contraceptive services would be contrary to their faith.

Accepting the sincerity of Plaintiffs' beliefs, however, does not relieve this Court of its responsibility to evaluate the substantiality of any burden on Plaintiffs' religious exercise, and to distinguish Plaintiffs' duties from obligations imposed, not on them, but on insurers and TPAs. Whether a law substantially burdens religious exercise under RFRA is a question of law for courts to decide, not a question of fact. *See Mahoney v. Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011) (stating that judicial inquiry into the substantiality of the burden "prevent[s] RFRA claims from being reduced into questions of fact, proven by the credibility of the claimant"); *Kaemmerling*, 553 F.3d at 679 ("[a]ccepting as true the factual allegations that Kaemmerling's beliefs are sincere and of a religious nature—but not the legal conclusion, cast as a factual allegation, that his religious exercise is substantially burdened"). "[A]lthough we acknowledge that the [plaintiffs] believe that the regulatory framework makes them complicit in the provision of contraception, we will independently determine what the regulatory provisions require and whether they impose a substantial burden on [plaintiffs'] exercise of religion." *Mich. Catholic Conf.*, 755 F.3d at 385; *see also Notre Dame*, 743 F.3d at 558 ("Notre Dame may consider the [self-certification] process a substantial burden, but substantiality—like

compelling governmental interest—is for the court to decide.").

Our own decision in *Kaemmerling* requires that we determine whether a burden asserted by Plaintiffs qualifies as "substantial" under RFRA. In *Kaemmerling*, a federal prisoner sought to enjoin the Bureau of Prisons under RFRA from collecting a sample of his blood, claiming a religious objection to "DNA sampling, collection and storage with no clear limitations of use." 553 F.3d at 678. We observed that "Kaemmerling's objection to 'DNA sampling and collection'" was not "an objection to the [Bureau] collecting any bodily specimen that contains DNA material . . . , but rather an objection to the government extracting DNA information from the specimen." *Id.* at 679. We did not simply accept Kaemmerling's characterization of his burden as "substantial," but instead independently evaluated the nature of the claimed burden on his religious beliefs. *See id.* at 678-79. The plaintiff failed to "allege facts sufficient to state a substantial burden on his religious exercise because he [could not] identify any 'exercise' which is the subject of the burden to which he objects." *Id.* at 679. The court acknowledged that "the government's activities with his fluid or tissue sample after the [Bureau] takes it may offend Kaemmerling's religious beliefs," but it rejected the substantial burden contention because "Kaemmerling alleges no religious observance that the DNA Act impedes, [n]or acts in violation of his religious beliefs that it pressures him to perform." *Id.*

In *Henderson v. Kennedy*, 253 F.3d 12, 17 (D.C. Cir. 2001), this Court similarly rejected the plaintiffs' formulation of the substantial-burden test as

forbidding the government's general application of religiously neutral law where it would impose *any* burden on religiously motivated conduct because doing so would "read out of RFRA the condition that only substantial burdens on the exercise of religion trigger the compelling interest requirement." As RFRA sponsor Senator Orrin Hatch explained, the Act "does not require the Government to justify every action that has some effect on religious exercise. Only action that places a substantial burden on the exercise of religion must meet the compelling State interest . . ." 139 Cong. Rec. 26,180 (1993) (statement of Sen. Hatch).

Under free exercise precedents that RFRA codified, the Supreme Court distinguished between substantial burdens on religious exercise, which are actionable, and burdens that are not. Burdens that are only slight, negligible, or *de minimis* are not substantial. And burdens that fall only on third parties not before the court do not substantially burden plaintiffs. *See, e.g.*, *Bowen*, 476 U.S. at 699 ("The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."); *Lyng*, 485 U.S. at 447 (finding it undisputed that the government's action "will have severe adverse effects on the practice of [plaintiffs'] religion," but disagreeing that such burden was "heavy enough" to subject that action to strict scrutiny).

In *Bowen*, a Native American plaintiff brought a free exercise challenge to a statute requiring the state to use his daughter's social security number to process welfare benefits requests. 476 U.S. at 695-96.

Roy, the father, believed that the government's use of the social security number of his daughter, Little Bird of the Snow, would serve to "'rob the spirit' of his daughter and prevent her from attaining greater spiritual power." *Id.* at 696. The Court rejected Roy's claim on the basis that, rather than complaining about a restriction on his own conduct, Roy sought to "dictate the conduct of the Government's internal procedures." *Id.* at 700. Roy's claim failed because, even though it seriously offended Roy's religious sensibilities, "[t]he Federal Government's use of a Social Security number for Little Bird of the Snow d[id] not itself in any degree impair Roy's freedom to believe, express, and exercise his religion." *Id.* at 700-01 (internal quotation marks omitted).

Building on the analysis in *Bowen*, the Supreme Court refused to apply strict scrutiny to the government's land use decision in *Lyng*, 485 U.S. at 450. There, members of Indian tribes claimed that the federal government violated their right to free exercise by permitting timber harvesting and construction on land they used for religious purposes. *Id.* at 441-42. The Court stated that its free exercise jurisprudence "does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions." *Id.* at 450-51.

According to Plaintiffs, this Court is bound to accept their understanding of the obligations the

regulations impose—including their view of the existence and substantiality of any burden on their own religious exercise—because to do otherwise would be tantamount to questioning the sincerity of their beliefs. Indeed, under Plaintiffs' view, we must accept a RFRA claimant's understanding of what the challenged law requires her to do (or to refrain from doing), even if that subjective understanding is at odds with what the law actually requires.[14] Plaintiffs' approach collapses the distinction between sincerely held belief and substantial burden. We must give effect to each term in the governing statute, however, including the requirement that only "substantial" burdens on religious exercise trigger strict scrutiny. We cannot accept Plaintiffs' proposal to prevent the

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[14] Plaintiffs elaborated their position in their responses to a hypothetical posed during oral argument. We posited a situation in which an adherent, similar to the plaintiff in *Thomas*, objected to working in a factory on the grounds that the tools he was manufacturing were being used to support a war effort that his sincere religious beliefs prohibited him from supporting. *See Thomas*, 450 U.S. at 710 (after being transferred to a department that "fabricated turrets for military tanks, . . . [Thomas] quit, asserting that he could not work on weapons without violating the principles of his religion"). Unlike the facts in *Thomas*, however, in our hypothetical, the adherent was not manufacturing tools used for war, but rather farm equipment that had no relationship whatsoever to any military effort. Counsel for both the *Priests for Life* Plaintiffs and the *RCAW* Plaintiffs conceded that, under their view, if the religious objection was to war machinery, not farm tools, a plaintiff who misperceived the facts underlying his challenge would be entitled nonetheless to a determination that requiring him to continue working in a farm tools factory imposed a substantial burden on his religious observance merely because he sincerely believed that it did. Oral Arg. Tr. at 9:3-11:16; 22:16-23:24.

court from evaluating the substantiality of the asserted burden.

2. The Accommodation Frees Eligible Organizations from the Contraceptive Coverage Requirement

A review of the regulatory accommodation shows that the opt-out mechanism imposes a *de minimis* requirement on any eligible organization: The organization must send a single sheet of paper honestly communicating its eligibility and sincere religious objection in order to be excused from the contraceptive coverage requirement. Once an eligible organization has taken the simple step of objecting, all action taken to pay for or provide its employees with contraceptive services is taken by a third party.

Specifically, the regulations require that, to be eligible for the accommodation, an organization must certify that it has a sincere religious objection to arranging contraceptive coverage.[15] *See* 45 C.F.R. § 147.131(b); 29 C.F.R. § 2590.715-2713A(a). The organization opts out under the regulations by affirming that it meets those eligibility criteria via a "self-certification" form sent to its group health plan issuer or TPA, or a letter to the Secretary of HHS (the "alternative notice"). 45 C.F.R. § 147.131(c)(1);

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[15] The Supreme Court, in *Hobby Lobby*, 134 S. Ct. at 2782, characterized the accommodation HHS designed for eligible organizations as a less restrictive means of serving the government's interest in the contraceptive coverage requirement that should be made available to the closely-held, for-profit religious corporate plaintiffs in that case. The government accordingly is extending the accommodation to such companies. *See* 79 Fed. Reg. at 51,094.

29 C.F.R. § 2590.715-2713A(b)(1)(ii); *see also* 79 Fed. Reg. 51,092, 51,094-95 (Aug. 27, 2014). An alternative notice to HHS must identify the forms of contraceptive services to which the employer objects, and specify, among other things, the name of the plan, the plan type, and the contact information for the plan issuer or TPA.[16] 45 C.F.R. § 147.131(c)(1)(ii); 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B). Once an eligible organization avails itself of the accommodation, that organization has discharged its legal obligations under the challenged regulations. *See* 45 C.F.R. § 147.131(c)(1), (e)(2); 29 C.F.R. § 2590.715-2713A(b)(1); 79 Fed. Reg. at 51,094-95.

The accommodation here works in the way such mechanisms ordinarily do: the objector completes the written equivalent of raising a hand in response to the government's query as to which religious organizations want to opt out. Once the eligible organization expresses its desire to have no involvement in the practice to which it objects, the government ensures that a separation is effectuated and arranges for other entities to step in and fill the gap as required to serve the legislatively mandated regime. Specifically, the regulations:

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[16] Initially, an eligible organization could only avail itself of the accommodation by completing the self-certification form. The Supreme Court issued an interim order in *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014), however, permitting an eligible organization to notify the Secretary of HHS in writing of its objection instead of sending the self-certification directly to the insurer or TPA. *Id.* at 2807. The Departments accordingly issued interim final regulations to authorize opting out using that alternative notice. 79 Fed. Reg. at 51,094-95.

- require that the group health plan insurer expressly exclude contraceptive coverage from the eligible organization's group health plan,[17] 45 C.F.R. § 147.131(c)(2)(i)(A);
- fully divorce the eligible organization from payments for contraceptive coverage, *see* 45 C.F.R. § 147.131(c)(2); 29 C.F.R. § 2590.715-2713A(b)(2)(i);
- require that the insurer or TPA notify the beneficiaries in separate mailings that it will be providing separate contraceptive coverage, 45 C.F.R. § 147.131(d); 29 C.F.R. § 2590.715-2713A(d);
- require that the insurer or TPA specify to the beneficiaries in those separate mailings that their employer is in no way "administer[ing] or fund[ing]" the contraceptive coverage. (The regulations include model language for such notice, suggesting that the insurer or TPA specify to employees that "your employer will not contract, arrange, pay, or refer for contraceptive coverage.") 45 C.F.R. § 147.131(d); 29 C.F.R. § 2590.715-2713A(d); and
- demand separate mailings and accounting on the part of the insurer or TPA, keeping

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[17] There is no analogous requirement for TPAs because it is the self-insured employer that controls the scope of coverage provided under its plan. Once it has opted out, a self-insured employer has satisfied its legal obligation under the contraceptive-coverage regulations. 29 C.F.R. § 2590.715-2713A(b)(1).

> contraceptive coverage separate for all purposes from the eligible organization's plan that exclude it, 45 C.F.R. § 147.131(c)(2)(ii), (d); 29 C.F.R. § 2590.715-2713A(b)(2), (d).

The regulations leave eligible organizations free to express to their employees their opposition to contraceptive coverage. In sum, both opt-out mechanisms let eligible organizations extricate themselves fully from the burden of providing contraceptive coverage to employees, pay nothing toward such coverage, and have the providers tell the employees that their employers play no role and in no way should be seen to endorse the coverage.

Plaintiffs' opposition to the consequences of the ACA's Women's Health Amendment, even with the accommodation, amounts to an objection to the regulations' requirement that third parties provide to Plaintiffs' beneficiaries products and services that Plaintiffs believe are sinful. What Plaintiffs object to here are "the government's independent actions in mandating contraceptive coverage, not to any action that the government has required [Plaintiffs] themselves to take." *Notre Dame*, 743 F.3d at 559 (quoting Order at 3, *Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 13-5368 (Dec. 31, 2013) (Tatel, J., statement) (hereinafter "Emergency Injunctions Order")). But RFRA does not grant Plaintiffs a religious veto against plan providers' compliance with those regulations, nor the right to enlist the government to effectuate such a religious veto against legally required conduct of third parties. *See, e.g.*, *Lyng*, 485 U.S. at 452; *Bowen*, 476 U.S. at 699-700; *Kaemmerling*, 553 F.3d at 679; *see also Mich.*

Catholic Conf., 755 F.3d at 388-89; *Notre Dame*, 743 F.3d at 552.

Plaintiffs seek to distinguish *Kaemmerling* and *Bowen* on the ground that, unlike the plaintiffs in those cases, they object to what the regulations require of *them*. But the only action the regulations require of Plaintiffs—completion of the self-certification or alternative notice—imposes a *de minimis* administrative obligation.[18] To the extent that their objection is to the role of that action in the broader regulatory scheme—a scheme that permits or requires independent coverage providers to take actions to which Plaintiffs object—their challenge is governed by *Kaemmerling* and *Bowen*. As in *Bowen*, even though Plaintiffs' "religious views may not accept this distinction between individual and governmental conduct," the Constitution does "recognize such a distinction." 476 U.S. at 701 n.6. So, too, does RFRA. And just as the plaintiffs in *Bowen* and *Kaemmerling* could not successfully challenge what the government chose to do with their social security numbers or DNA specimens, respectively, Plaintiffs have no RFRA claim against the government's arrangements with others to provide coverage to women left partially uninsured as a result of Plaintiffs' opt out. RFRA does not treat the government requiring third parties to provide contraceptive coverage in the face of an employer's

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[18] Plaintiffs object that characterizing the accommodation as simply filling out a form ignores the meanings that Plaintiffs attach to the form. But the meaning Plaintiffs attach to the form derives from their contention that their completion of the form causes third parties to take action. The error of that contention is discussed more fully *infra* Section IV.A.2.a.

religious disapproval as tantamount to the government requiring the employer itself to sponsor such coverage. *See Mich. Catholic Conf.*, 755 F.3d at 388-89; Notre Dame, 743 F.3d at 554-55; *id.* at 559 (quoting Emergency Injunctions Order at 3 (Tatel, J., statement)).

Plaintiffs nonetheless insist that, even with the accommodation, the regulations substantially burden their religious exercise by continuing to require that they play a role in the facilitation of contraceptive use. In particular, they contend that: (1) "signing and submitting the self-certification" or alternative notice "triggers" or "impermissibly facilitates delivery of the objectionable coverage" to the beneficiaries of their health plans; (2) the regulations require "contracting with third parties authorized or obligated to provide the mandated coverage;" and (3) the regulations require "maintaining health plans that will serve as conduits for the delivery of the mandated coverage." Pls.' Br. 12, 18; Pls.' Supp'l Br. 1. Additionally, self-insured Plaintiffs contend that their self-certification expressly and impermissibly authorizes their TPAs to provide contraceptive coverage.

Each of those separate, but related, arguments fails for fundamentally the same reason: Notwithstanding Plaintiffs' contrary contentions, the regulations provide an opt-out mechanism that shifts to third parties the obligation to provide contraceptive coverage to which health insurance beneficiaries are entitled, and that fastidiously relieves Plaintiffs of any obligation to contract, arrange, pay, or refer for access to contraception in

any way that might constitute a substantial burden on their religious exercise under RFRA.

a. Plaintiffs' Opt-Out Does Not Trigger Contraceptive Coverage

Plaintiffs claim that the requirement that they submit the self-certification to their plan issuers or TPAs, or submit the alternative notice to the government, makes them "authorize" or "trigger" the provision of the contraceptive coverage they find religiously abhorrent. They characterize the self-certification and alternative notice as "permission slips" for their plan issuers and TPAs to provide contraceptive coverage to Plaintiffs' employees. Pointing to the regulatory requirements of an insurer or TPA after an eligible organization has availed itself of the accommodation, Plaintiffs argue that it is their own act of self-certifying or completing the alternative notice that "confers . . . both the authority and obligation" on the insurance companies and TPAs to provide the objected-to coverage to Plaintiffs' employees. Pls.' Br. 9.

Plaintiffs' "permission slip" argument misstates how the regulations operate. As the Sixth and Seventh Circuits have also concluded, the insurers' or TPAs' obligation to provide contraceptive coverage originates from the ACA and its attendant regulations, not from Plaintiffs' self-certification or alternative notice. *See Mich. Catholic Conf.*, 755 F.3d at 387; *Notre Dame*, 743 F.3d at 554. The regulations require that "a group health plan, or a health insurance issuer offering group or individual health insurance coverage, must provide coverage" for a variety of types of preventive care, including the coverage to which Plaintiffs object. 45 C.F.R.

§ 147.130(a)(1). That obligation exists apart from any action that Plaintiffs take. "'Because Congress has imposed an independent obligation on insurers to provide contraceptive coverage to [an eligible organization's] employees, those employees will receive contraceptive coverage from their insurers *even if* [objectors] self-certify—but not *because* [objectors] self-certify.'" *Notre Dame*, 743 F.3d at 559 (quoting Emergency Injunctions Order at 3 (Tatel, J., statement)).

Indeed, contrary to Plaintiffs' characterization, what the self-certification or alternative notice actually triggers is a series of steps designed to ensure that eligible organizations such as Plaintiffs do *not* contract, arrange, pay, or refer for access to contraceptive services. The regulations fully relieve Plaintiffs from the obligation to provide or pay for contraceptive coverage, and instead obligate a third party to provide that coverage separately.

The illogic of Plaintiffs' "trigger" argument is highlighted by the conscientious objector scenario recounted above. The implication of Plaintiffs' position is that the Selective Service could deny a religious conscientious objector's RFRA claim against calling up the next draftee only if the government's decision to do so survived strict scrutiny. That strikes us as "a fantastic suggestion." *Notre Dame*, 743 F.3d at 556. There, as here, the feature that defeats Plaintiffs' argument is plain: It was the government's selective service draft quota, not the conscientious objector exercising his accommodation right, that determined whether a replacement would be called. So, too, it is the ACA that requires that plan issuers and TPAs fill the resulting gaps, not the

opt-out notice. In neither case is the objecting party substantially burdened by, and thus entitled to accommodation from, the sequelae of opting out. Accurately understood, the opt-out mechanism imposes on Plaintiffs only the *de minimis* administrative burden associated with completing the self-certification form or the alternative notice. *See id.* As long as Plaintiffs complete either notice, the regulations excuse them from any further involvement in providing contraceptive coverage. As discussed above, the beneficiaries receive contraceptive coverage not because Plaintiffs have completed the self-certification or alternative notice, but because the ACA imposes an independent obligation on insurers and TPAs to provide this coverage.

b. Plaintiffs' Contracts with Providers Do Not Authorize or Facilitate Contraceptive Coverage

Plaintiffs further contend that the regulations substantially burden their religious exercise by requiring contraceptive coverage to be provided for their employees and students by the same entities with which Plaintiffs have contracted to provide non-contraceptive health coverage. Once Plaintiffs opt out of the contraceptive coverage requirement, however, contraceptive services are not provided to women because of Plaintiffs' contracts with insurance companies; they are provided because federal law requires insurers and TPAs to provide insurance beneficiaries with coverage for contraception. Plaintiffs' contracts do not in any way authorize or condone the insurers' or TPAs' provision of the coverage. The separate interactions between non-

objecting insurance companies and beneficiaries do not substantially burden Plaintiffs' religious exercise, just as third-party actions in other religious-exercise cases have been held not to burden plaintiffs. *See, e.g.*, *Bowen*, 476 U.S. at 699-700; *Kaemmerling*, 553 F.3d at 679; *see also Notre Dame*, 743 F.3d at 552. We do not understand Plaintiffs to contend that RFRA privileges them generally to require that the extra-contractual rights and legal obligations of individuals and entities with whom they contract conform to Plaintiffs' religious beliefs, nor could they.

c. Plaintiffs' Plans Are Not Conduits for Contraceptive Coverage

Plaintiffs also argue that the regulations substantially burden their religious exercise by permitting their insurance plans to be used as conduits through which their employees receive contraception. Plaintiffs identify a number of acts—such as paying premiums and offering enrollment paperwork—that they contend they must take that ensure that the contraceptive "pipeline" remains open. None of those acts, however, requires Plaintiffs to contract, arrange, pay, or refer for access to contraception. Once Plaintiffs take advantage of the accommodation, they are dissociated from the provision of contraceptive services. The premiums and enrollment paperwork support the provision of health care coverage to which Plaintiffs have no objection—and nothing more.

Plaintiffs contend that their plans remain a conduit for the provision of contraceptives because they are required to pay premiums or fees to entities in charge of the plans that provide contraceptive benefits. The regulations, however, expressly

prevent insurers and TPAs from directly or indirectly charging Plaintiffs for the cost of contraceptive coverage and obligate third parties to pay for the contraceptive services. 45 C.F.R. § 147.131(c)(2)(ii); 29 C.F.R. § 2590.715-2713A(b)(2). Therefore, although Plaintiffs are required to pay premiums and fees to their group health plan issuers or TPAs, those entities are legally prohibited from using Plaintiffs' payments to fund contraceptive services.

Plaintiffs further contend that their plans are used as conduits because, they assert, they must provide their beneficiaries with enrollment paperwork to enable them to participate in a plan that provides coverage for contraceptives, and they must send, or tell their beneficiaries where to send, the enrollment paperwork. Under the regulations, however, the employer has no such obligation. The insurer or TPA is entirely responsible for any paperwork related to contraceptive coverage. The insurer or TPA must provide beneficiaries with notice of the availability of contraceptive coverage, the notice must be separate from any materials distributed in connection with the individual's enrollment in the employer's plan, and the notice must make clear that the employer is not playing any role in the contraceptive coverage. 45 C.F.R. § 147.131(d); 29 C.F.R. § 2590.715-2713A(d).

Plaintiffs also argue that their plans serve as conduits because they must identify their health plan beneficiaries to their insurers or TPAs. No regulation related to the accommodation imposes any such duty on Plaintiffs. *See Mich. Catholic Conf.*, 755 F.3d at 389. Plaintiffs will have necessarily provided their plans or TPAs with the names of employees enrolling in their health care plan so that those

individuals may be provided with health care coverage. To the extent that Plaintiffs object to the actions the insurers or TPAs will take after receiving those names, Plaintiffs are objecting to an independent obligation imposed on a third party by the government. As discussed above, RFRA does not protect parties from obligations imposed on third parties by outside sources. In short, none of the actions that Plaintiffs identify is actually required of them under the regulations, and none of those actions makes their plans conduits for contraceptive coverage.[19]

d. Regulations Specific to the Self-Insured Plaintiffs Do Not Create a Substantial Burden

Finally, the self-insured Plaintiffs object to the regulatory provisions that apply particularly to self-insured organizations. They object that their self-certification forms are what designate their TPAs as the plan administrators for contraceptive benefits under section 3(16) of ERISA and also serve as instruments under which the health plans are operated. *See* 29 C.F.R. § 2510.3-16(b). They argue that the regulations thus put them in the position of

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[19] On a related note, Plaintiffs contend that they must refrain from canceling their contract with a third party authorized to provide coverage for contraceptive services and from attempting to influence a third party's decision to provide the coverage for contraception. The government denied that the regulations would require Plaintiffs to refrain from taking either of those actions. Gov. Br. 33-34; Oral. Arg. Tr. at 46:15-48:1. In any event, as discussed *infra* note 28, the regulations have been revised to remove the provision that Plaintiffs alleged so constrained them.

facilitating the provision of contraceptives by authorizing the TPAs to take actions they previously could not have taken.

That argument miscasts the regulations, which do not require the self-insured Plaintiffs to name their TPAs as ERISA plan fiduciaries. Plaintiffs submit forms to communicate their decisions to opt out, not to authorize TPAs to do anything on their behalf. The regulatory treatment of the form as sufficient under ERISA does not change the reality that the objected-to services are made available because of the regulations, not because Plaintiffs complete a self-certification. 29 C.F.R. § 2510.3-16(b); *see Notre Dame*, 743 F.3d at 554-55; 78 Fed. Reg. at 39,880.

The self-insured Plaintiffs raise a parallel objection to the alternative process established by the revised regulations. Under the revised regulations, once the government receives an alternative notice from an eligible organization, the government sends the TPA a notification that will "designate the relevant [TPA] as plan administrator under section 3(16) of ERISA for those contraceptive benefits that the [TPA] would otherwise manage." 79 Fed. Reg. at 51,095; *see also* 29 C.F.R. § 2510.3-16(b). The regulations make the government's notification to the TPA "an instrument under which the plan is operated." 29 C.F.R. § 2510.3-16(b).

The self-insured Plaintiffs contend that the revised regulations thereby violate ERISA because the government lacks authority to name a plan administrator or amend Plaintiffs' plan instruments. Plaintiffs do not contend, however, that the government lacks authority to author a plan instrument or designate a particular writing as a

plan instrument, and it is this authority the regulations deploy. Once the government receives the alternative notice, it directs the TPA to cover contraceptive services and, treating its own direction as the new plan instrument, the government names the TPA as the plan administrator of contraceptive coverage. ERISA expressly permits a plan instrument to name a plan administrator. 29 U.S.C. § 1002(16)(A)(i) (defining "administrator" as "the person specifically so designated by the terms of the instrument under which the plan is operated").[20] By naming the plan administrator in the plan instrument, the government complies with ERISA. The government's approach does not, contrary to Plaintiffs' contention, amend or alter Plaintiffs' own plan instruments; the government directs only the contraceptive coverage.

The self-insured Plaintiffs also contend that they are required to facilitate access to contraceptive coverage because, if their existing TPAs decline to assume the responsibility to provide contraceptive coverage, the regulations obligate Plaintiffs to take affirmative steps to identify and contract with new TPAs. The district court granted summary judgment for Plaintiff Thomas Aquinas College on this ground. *RCAW*, 2013 WL 6729515, at *24. Upon *de novo* review, we reject Thomas Aquinas's argument as premature. Thomas Aquinas has not made any showing that its TPA has any intention of refusing to

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[20] ERISA also states that "in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified," the administrator is "such other person as the Secretary [of Labor] may by regulation prescribe." 29 U.S.C. § 1002(16)(A)(iii).

provide contraceptive coverage to its employees.[21] Moreover, the government has clarified that, if an eligible organization's existing TPA were to decline to assume responsibility for providing contraceptive coverage, the regulations do not require the eligible organization to identify and contract with a new one. *See* 78 Fed. Reg. at 39,880-81. We believe that clarification requires us to vacate the district court's grant of summary judgment for Thomas Aquinas.

* * *

In sum, RFRA grants Plaintiffs a right to be free of any unjustified substantial governmental burden on their religious exercise. The regulatory requirement that they use a sheet of paper to signal their wish to opt out is not a burden that any precedent allows us to characterize as substantial. It is as a result of the ACA, and not because of any actions Plaintiffs must take, that Plaintiffs' employees are entitled to contraceptive coverage provided by third parties and that their insurers or TPA must provide it; RFRA does not entitle Plaintiffs to control their employees' relationships with other entities willing to provide health insurance coverage to which the employees are legally entitled. A religious adherent's distaste for what the law requires of a third party is not, in

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[21] *See* 29 C.F.R. § 2590.715-2713A(b)(2) ("If a [TPA] receives a copy of the self-certification . . . *and agrees to enter into or remain* in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the [TPA] shall provide or arrange payments for contraceptive services . . ." (emphasis added)); 78 Fed. Reg. at 39,880.

itself, a substantial burden; that is true even if the third party's conduct towards others offends the religious adherent's sincere religious sensibilities. The regulations go to great lengths to separate Plaintiffs from the provision of contraceptive coverage. Plaintiffs have failed to demonstrate a substantial burden on their religious exercise that would subject the contraceptive coverage requirement to strict judicial scrutiny.

B. The Accommodation Survives Strict Scrutiny

When the parties filed their initial briefs on appeal, the government conceded that this Court's decision in *Gilardi v. U.S. Department of Health & Human Services*, 733 F.3d 1208 (D.C. Cir. 2013), *vacated*, 134 S. Ct. 2902 (2014), controlled the compelling-interest inquiry here. Gov. Br. 44. In *Gilardi*, we held at the preliminary injunction stage that, while a closely-held, for-profit business corporation was not a "person" whose religious exercise was protected by RFRA, its individual owners had RFRA rights that were injured by application of the contraceptive coverage requirement to their firm. 733 F.3d at 1214-19. Lack of a regulatory accommodation applicable to such religious objectors constituted a substantial burden, and the government failed to establish a compelling interest that justified it. *Id.* at 1219-22.

While this appeal was pending, the Supreme Court vacated *Gilardi* in view of its decision in *Hobby Lobby*, 134 S. Ct. 2902 (2014). The Court also, in *Wheaton College v. Burwell*, 134 S.Ct. 2806 (2014), preliminarily enjoined the requirement that a party seeking to opt out use the self-certification form as

specified in the regulations. The plaintiff in that case already had notified the government of its eligibility and desire for exemption without using that form, and the Court required HHS to accept that as adequate notice. Because the Court's decisions and a new Interim Final Rule responding to the *Wheaton College* order (*see* 79 Fed. Reg. at 51,092) unsettled the governing law, we requested supplemental briefing.[22]

We directed the parties to brief the implications for this appeal of the intervening legal developments. We specifically requested briefing on the substantial-burden and strict-scrutiny issues, and received such briefing from both parties.

Hobby Lobby's analysis is instructive, even though the substantial-burden and least-restrictive-means questions posed by the lack of any accommodation available to the plaintiffs in *Hobby Lobby* are very different from those presented here, where the government has provided an accommodation. As discussed above, we conclude that the accommodation does not impose a substantial burden on Plaintiffs in this case. *See Mich. Catholic Conf.*, 755 F.3d at 390; *Notre Dame*, 743 F.3d at 554-559. To the extent that the Supreme Court's recent order in *Wheaton College* might be read to signal a different conclusion, analysis of the strict scrutiny question is also called for. The *Hobby Lobby* Court's discussion of the weightiness of the government's interests is in substantial tension with *Gilardi*'s approach to the strict scrutiny analysis. We thus proceed in light of the intervening decisions to analyze whether the

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[22] *See supra* notes 15 & 16.

accommodation is the least restrictive means to serve a compelling governmental interest.

The challenged regulations seek to ensure timely and effective access to contraception for all women who want it and for whom it is medically appropriate. The government contends that the regulations are amply supported because they arise at the intersection of overlapping governmental interests, each of which is compelling: public health, and women's well-being. The government claims an interest in independently assuring seamless contraceptive coverage, regardless of whether the insured woman receives her other health insurance coverage through her (or her family member's) employment at a religious nonprofit that objects to providing it.

The Supreme Court's characterizations of the government's asserted compelling interest and the narrow tailoring of the accommodation were dicta in *Hobby Lobby*. The accommodation was not challenged there; it was only adverted to as a potential remedy for the non-accommodated plaintiffs in that case. As next discussed, however, the Court's characterizations are consistent with our conclusions that (1) the contraceptive coverage requirement—and, specifically, its guarantee for employees whose employers partake of the accommodation—is supported by compelling governmental interests, and (2) it imposes no unnecessary constraints on Plaintiffs' religious exercise.

1. The Government Has Demonstrated Compelling Interests That Support Seamless Provision of Contraceptive Coverage

In promulgating the challenged regulations, the government asserted an interest in supporting women's unhindered, cost-free access to contraceptive services. *See* 78 Fed. Reg. at 39,887-88. The Supreme Court in *Hobby Lobby* assumed, without deciding, that the governmental interest in "guaranteeing cost-free access" to contraception was "compelling." *Hobby Lobby*, 134 S. Ct. at 2780. Five members of the Court separately signed onto opinions that appear to be more affirmative. Justice Kennedy, concurring, found it "important to confirm" that the "premise of the Court's opinion is its assumption that the HHS regulation here at issue furthers a legitimate and compelling interest in the health of female employees." *Id.* at 2786. He noted that the government "makes the case" that the contraceptive coverage requirement "serves the Government's compelling interest in providing insurance coverage that is necessary to protect the health of female employees, coverage that is significantly more costly than for a male employee." *Id.* at 2785-86. Justice Ginsburg, writing for four dissenting justices, recounted the government's evidence establishing the importance of contraception to a range of women's health needs, and concluded that contraceptive coverage under the ACA "furthers compelling interests in public health and women's well being." *Id.* at 2799-2800.

There is no simple formula for identifying which governmental interests rank as compelling, but

certain touchstones aid our analysis. Interests in public health, safety, and welfare—and the viability of public programs that guard those interests—may qualify as compelling, as may legislative measures to protect and promote women's well being and remedy the extent to which health insurance has not served women's specific health needs as fully as those of men.

The government's asserted compelling interest here, writ large, is in a sustainable system of taxes and subsidies under the ACA to advance public health. That interest is as strong as those asserted in cases such as *United States v. Lee*, 455 U.S. 252, 258 (1982), and *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 699-700 (1989), recognizing governmental interests in broad participation in public tax and benefits systems as sufficiently compelling to outweigh countervailing claims that they unjustifiably burdened religious exercise.

In *Lee*, the Supreme Court held that the government's interest in a nationwide social security system was sufficiently weighty to require that an Amish employer pay unemployment and social security taxes, even though the Court acknowledged that doing so would burden the Amish employer's religious beliefs. 455 U.S. at 258. The Court observed that the social security system "serves the public interest by providing a comprehensive insurance system with a variety of benefits available to all participants, with costs shared by employers and employees." *Id.* The system would not have been viable unless broad participation was required, and the Court held that the governmental interest "in assuring mandatory and continuous participation in

and contribution to the social security system" sufficed to justify the acknowledged burden on the employer's religious exercise. *Id.* at 258-59.

So, too, in *Hernandez*, the Court rejected a claim that denial of certain tax deductions violated the plaintiffs' religious exercise because "even a substantial burden [on the exercise of religion] would be justified by the broad public interest in maintaining a sound tax system." 490 U.S. at 699-700 (internal quotation marks omitted). The government concluded that the success of the ACA's effort to expand access to health care, improve outcomes, and control costs similarly depends on widespread use of preventive care, which the Act encourages by requiring that particular preventive measures be provided free of cost. *See* 78 Fed. Reg. at 39,872.

The Supreme Court's recognition of compelling governmental interests in the physical health and safety of the public, albeit in factually very different contexts, further supports the gravity of the government's interest in the contraceptive coverage requirement. *See, e.g.*, *Prince v. Massachusetts*, 321 U.S. 158, 165-67 (1944); *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905). The Court in *Prince* sustained child labor laws against a free exercise challenge based on the government's paramount interest in protecting the health and welfare of children. 321 U.S. at 165-71. In *Jacobson*, a mandatory, mass vaccination program withstood a constitutional liberty challenge because it served the government's interest in "the public health and the public safety." 197 U.S. at 25-26. Those cases support the strength of health interests behind the

contraceptive coverage regulations, which include interests in avoiding health risks to women and children from unplanned pregnancies. Indeed, these very same interests—pediatric care and immunizations—are protected by companion provisions to the Women's Health Amendment in the ACA. *See* 42 U.S.C. § 300gg-13(a)(2), (3). Under Plaintiffs' argument, and contrary to *Prince* and *Jacobson*, those interests could fall to the same type of religious challenge as is leveled here by organizations that sincerely object to the types of care they cover.

The Supreme Court has recognized the interest in eliminating discrimination against women as sufficiently compelling to justify incursions on rights to expressive association. *See Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987); *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 625-26 (1984) (recognizing compelling interest in creating "rights of public access" to private goods and services in order to promote women's equal enjoyment of leadership skills, business contacts, and employment promotions). Those cases lend gravitas to the government's interest in the contraceptive coverage requirement as an effort to eradicate lingering effects of sex discrimination. *See generally Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

The Supreme Court majority in *Hobby Lobby* characterized the government's interests in "promoting public health and gender equality" as "broadly framed" and noted that RFRA "contemplates a more focused inquiry." 134 S. Ct. at 2779 (internal quotation marks omitted). The government has

pathmarked the more focused inquiry by explaining how those larger interests inform and are specifically implicated in its decision to support women's unhindered access to contraceptive coverage. We do not take the government to suggest that its interests in "public health" and "gender equality" necessarily render compelling every subsidiary governmental action that advances them. Each of those interests, however, specifically undergirds the government's decision here to provide seamless coverage of contraceptive services for women who want them and whose doctors prescribe them.

As we explain below, compelling interests converge to support the government's decision, reflected in the challenged regulations, to provide cost-free contraceptive coverage and to remove administrative and logistical obstacles to accessing contraceptive care. Those compelling governmental interests suffice to support requiring eligible organizations to ask for an accommodation if they want to take advantage of one, so that the government can protect its interests by ensuring that the resulting coverage gaps are filled.

a. Improving Public Health Through Contraceptive Coverage

The ACA is an ambitious effort to reform the health care system in the United States. It is designed to expand access to comprehensive insurance coverage as a means of controlling spiraling health care costs while improving health. *See* Cong. Budget Office, *Key Issues in Analyzing Major Health Insurance Proposals* 1 (2008) ("CBO Report"); *see also* Remarks by the President at the Annual Conference of the American Medical

Association (June 15, 2009), http://www.whitehouse.gov/the-press-office/remarks-president-annual-conference-american-medical association. The United States in recent years spent far more on health care than did many other developed nations. At the same time, the quality of care Americans received was lower and our population was no healthier than people in countries that spent less. CBO Report at 1.

Congress understood that improved health at affordable cost cannot be attained without increased reliance on preventive care. Most people underestimate the importance of prevention and are easily hindered from undertaking preventive steps because the costs and effort of preventive health care are immediate while benefits typically are uncertain and deferred. Many adverse health conditions and an enormous amount of costly care can be avoided if people better understand risky behavior, plan more carefully, and take measures to reduce their risks, exposures, and errors. Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps* 16-17 (2011) ("IOM Report").[23] Providing preventive care—including patient education, screenings, preventive medications and devices, and early treatment—can be less costly than treating advanced diseases and conditions. *See id.*; *Chronic Diseases and Health Promotion*, Centers for Disease Control and Prevention, http://www.cdc.gov/chronicdisease/overview/ (last visited Nov. 5, 2014); *see also* CBO Report at 136-38.

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[23] As noted above, the government directed the HRSA, in consultation with IOM, to develop guidelines for women's preventive care services. This report was part of that effort.

Yet, before enactment of the ACA, only a small portion of health care spending went to prevention. *See* Centers for Disease Control and Prevention, *The Power of Prevention* (2009), *available at* http://www.cdc.gov/chronicdisease/pdf/2009-power-of-prevention.pdf.

Congress and the Executive Branch determined that serving the government's compelling public health interests depends on overcoming the human behavioral tendencies of denial and delay documented in the legislative and regulatory record. People tend to eschew preventive care when they have to pay for it, make even minor efforts to learn about and enroll in new programs, keep multiple appointments, or follow new routines. Because "[i]ndividuals are more likely to use preventive services if they do not have to satisfy cost-sharing requirements," 78 Fed. Reg. at 39,872, the ACA requires group or individual health plans to include coverage for a variety of preventive health services without cost sharing. 42 U.S.C. § 300gg-13(a). "Studies have . . . shown that even moderate copayments for preventive services" can "deter patients from receiving those services." IOM Report at 19.

The government further determined that the imperative of providing broad access to preventive care applies with full force to women's health. Congress was informed during debates on the ACA that "too many women are delaying or skipping preventive care because of the costs of copays and limited access. In fact, more than half of women delay or avoid preventive care because of its costs." 155 Cong. Rec. 28,843 (2009) (statement of Sen.

Gillibrand); *see also* 155 Cong. Rec. 28,842-43 (2009) (statement of Sen. Mikulski). In light of this reality, Senator Mikulski proposed the Women's Health Amendment, which expanded the list of preventive health services the ACA required that insurers cover without cost sharing to include preventive health care and screenings for women. 155 Cong. Rec. 28,800-02 (2009) (codified at 42 U.S.C. § 300gg-13(a)(4)). Congress in the ACA directed the HRSA to develop the list of covered preventive services. The HRSA commissioned the IOM to identify preventive health services with strong scientific evidence of health benefits. The IOM's report recommended preventive services it deemed necessary for women's health and well-being. HRSA accepted IOM's findings and recommendations, and the Departments relied on them when crafting both the exemption and the accommodation.

The HRSA and IOM concluded that, given women's reproductive health needs, preventive health services for women should include contraceptive coverage. IOM Report at 109-10; *see also* 77 Fed. Reg. at 8,725. The government recognized that the cost of reproductive health care, including contraceptives, is significant, and it falls disproportionately on women. 78 Fed. Reg. at 39,873, 39,887. The vast majority of women who have sex with men use contraceptives at least some of the time. *See* IOM Report at 103. Most contraceptives used by women, and the forms that are most effective and fully reversible, are available only with a prescription and in some cases must be administered by a medical professional. *See id.* at 105; Kimberly Daniels, et al., *Contraceptive Methods Women Have Ever Used: United States, 1982-2010*, 62 Nat'l Health Stat. Rep. 1 (2013), *available at*

http://www.cdc.gov/nchs/data/nhsr/nhsr062.pdf (hereinafter "Daniels"). Those forms—including birth control pills, injectable methods, contraceptive patches, and intrauterine devices ("IUD")—have been used at one time or another by 88 percent of women who have had sexual intercourse. Daniels at 1.

The Institute of Medicine observed that high costs regularly cause women to forego contraception completely or to choose less effective methods: "Even small increments in cost sharing have been shown to reduce the use of preventive services . . . . The elimination of cost sharing for contraception therefore could greatly increase its use, including the use of the more effective and longer-acting methods, especially among poor and low-income women most at risk for unintended pregnancy." IOM Report at 109; *see also* 78 Fed. Reg. at 39,873. Prescription methods of contraception have lower failure rates than non-prescription methods such as condoms, IOM Report at 105, but can be quite expensive. The cost of an IUD, one of the most convenient and effective forms of reversible contraception, is nearly a month's full-time pay for workers earning the minimum wage, and its cost makes it less likely that women will use it. *Hobby Lobby*, 134 S. Ct. at 2800 (Ginsburg, J., dissenting).

Thus the government decided to require contraceptive coverage without cost sharing because appropriate and consistent use of contraceptives furthers women and children's health in a variety of ways. Enabling couples to control the timing and spacing of pregnancies improves women's health outcomes. Short intervals between pregnancies increase maternal mortality and pregnancy-related

complications. IOM Report at 103-04. Even a normal and healthy pregnancy is a demanding physical process for a woman. Pregnancy increases risks of health complications, such as anemia, gestational diabetes, hypertension, hyperemesis gravidarum, and even death. *See generally* 78 Fed. Reg. at 39,872, 39,887 (stressing the importance of covering preventive care to respond to women's unique health needs); *Pregnancy Complications*, Centers for Disease Control and Prevention, http://www.cdc.gov/reproductivehealth/maternalinfanthealth/pregcomplications.htm (last visited Nov. 5, 2014); *Pregnancy Related Deaths*, Centers for Disease Control and Prevention, http://www.cdc.gov/reproductivehealth/MaternalInfantHealth/Pregnancy-relatedMortality.htm (last visited Nov. 5, 2014).

A core reason the government sought under the ACA to expand access to contraception is that use of contraceptives reduces unintended pregnancies. According to the Institute of Medicine, in 2001, "49 percent of all pregnancies in the United States were unintended." IOM Report at 102. There is "an 85 percent chance of an unintended pregnancy within 12 months among couples using no method of contraception." *Id.* at 105. Unintended pregnancies elevate health risks for women and children and impose other costs on society. Women whose pregnancies are unintended are more likely to experience depression, anxiety, or domestic violence during those pregnancies. IOM Report at 103; *see also Korte v. Sebelius*, 735 F.3d 654, 725 (7th Cir. 2013) (Rovner, J., dissenting). "In 2001, 42 percent of U.S. unintended pregnancies ended in abortion." IOM Report at 102. Reducing the frequency of

unintended pregnancies would reduce the frequency of abortions. 78 Fed. Reg. at 39,872; *see also* IOM Report at 105. Supporting access to contraception empowers women to avoid the physical burdens and risks of pregnancy unless and until they decide to undertake them.

The government further relied on the ways that contraceptive use can promote and improve women's health apart from their procreative health needs. Women contraindicated for pregnancy, such as those with certain heart conditions, hypertension, diabetes, Marfan Syndrome, or lupus, face health hazards from pregnancy that can be life threatening. *See* 78 Fed. Reg. at 39,872; IOM Report at 103-04; *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring), *id.* at 2799 (Ginsburg, J., dissenting). Women with those conditions have especially critical needs to time their pregnancies appropriately, such as by waiting until their conditions are under control. Doctors also recommend that women taking certain medications that pose risk to maternal and fetal health avoid getting pregnant. Hormones manufactured and sold as contraception are also used to treat, manage, or prevent other diseases, such as "certain cancers, menstrual disorders, and pelvic pain." *Hobby Lobby*, 134 S. Ct. at 2799 (Ginsburg, J., dissenting); *see also* 78 Fed. Reg. 39,872; IOM Report at 107.

The Institute of Medicine reported that, for similar reasons, contraceptive use also promotes the health of infants and children. Children who are born as the result of unintended pregnancy suffer increased health risks on average, including preterm birth and low birth weight and associated complications. IOM Report at 103. Women who do not immediately know

they are pregnant, or are ambivalent about bearing children, are more likely to delay prenatal care or engage in behaviors that pose pregnancy related risks. 78 Fed. Reg. at 39,872; IOM Report at 103. Short intervals between pregnancies also can have serious health consequences for infants, such as low birth weight, prematurity, and small-for-gestational age. 78 Fed. Reg. at 38,872; IOM Report at 103. Women in hazardous jobs or precarious or dangerous living situations may need to delay pregnancy in order to reduce the health risks for a child. Permitting women to control the timing and spacing of their pregnancies improves the health and welfare of women, children, and infants.

b. Assuring Women Equal Benefit of Preventive Care By Requiring Coverage of Their Distinctive Health Needs

The government also relied on evidence that advancing women's well being by meeting their health needs as fully as those of men was a compelling reason for a contraceptive coverage requirement. In enacting and implementing the ACA, the government sought to provide coverage that offers equal benefit for men and women. 78 Fed. Reg. at 39,887. Before the ACA, insurance coverage for a female employee was "significantly more costly than for a male employee." *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring). Women paid more for the same health insurance coverage available to men and "in general women of childbearing age spen[t] 68 percent more in out-of-pocket health care costs than men." 155 Cong. Rec. 28,843 (2009) (statement of Sen. Gillibrand); *see* 78 Fed. Reg. at 39,887.

The government recognized that women pay more for the same health benefits in part because services more important or specific to women have not been adequately covered by health insurance. *See* 155 Cong. Rec. 28,843 (2009) (statement of Sen. Gillibrand). Contraception is a key element of preventive care for many women, yet the methods that are most reliable and are under a woman's control require prescriptions and are disproportionately more expensive than non-prescription forms of contraception. *See* IOM Report at 105, 108. Condoms, which are inexpensive and widely available over the counter, require men's cooperation and are substantially less effective in pregnancy prevention than prescription methods. *See id.* at 105. When Congress added the Women's Health Amendment to the ACA, which requires group health plans to include preventive health care services for women without cost sharing, it did so precisely to end "the punitive practices of the private insurance companies in their gender discrimination." 155 Cong. Rec. 28,842 (daily ed. Dec. 1, 2009) (statement of Sen. Mikulski). The government concluded that a preventive care package that failed to cover contraception would not give women access, equal to that enjoyed by men, to the full range of health care services recommended for their specific needs. *See* 78 Fed. Reg. at 39,887.

For most women, whether and under what circumstances to bear a child is the most important economic decision of their lives. An unintended pregnancy is virtually certain to impose substantial, unplanned-for expenses and time demands on any family, and those demands fall disproportionately on women. As the Supreme Court has recognized "[t]he

ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 856 (1992); 78 Fed. Reg. at 39,873 ("[A]ccess to contraception improves the social and economic status of women."). Congress noted when enacting the Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e *et seq.*), and Family and Medical Leave Act, Pub. L. No. 103-3, 107 Stat. 6 (codified at 29 U.S.C. § 2601 *et seq.*), a woman's ability to get pregnant has led to pervasive discrimination in the workplace.[24]

The government has amply substantiated its compelling interests in the accommodation. The government has overlapping and mutually reinforcing compelling interests in promoting public health and gender equality. The contraceptive coverage requirement specifically advances those interests. It was adopted to promote women's equal access to health care appropriate to their needs,

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[24] *See Hibbs*, 538 U.S. at 736 ("'Historically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second. This prevailing ideology about women's roles has in turn justified discrimination against women when they are mothers or mothers-to-be.'" (quoting *The Parental and Medical Leave Act of 1986: Joint Hearing before the Subcommittee on Labor-Management Relations and the Subcommittee on Labor Standards of the House Committee on Education and Labor*, 99th Cong., 2d Sess., 100 (1986)); *see also* S. Rep. No. 95-331, at 3 (1977) ("A failure to address discrimination based on pregnancy, in fringe benefits or in any other employment practice, would prevent the elimination of sex discrimination in employment.").

which in turn serves women's health, the health of children, and women's equal enjoyment of their right to personal autonomy without unwanted pregnancy. We hold that the accommodation is supported by the government's compelling interest in providing women full and equal benefits of preventive health coverage, including contraception and other health services of particular relevance to women.

2. The Regulations Use the Least Restrictive Means to Ensure Contraceptive Coverage While Accommodating Religious Exercise

In addition to calling on us to inquire whether the challenged contraceptive coverage requirement serves a compelling interest, RFRA demands that we guard against unnecessary impositions on religious exercise by carefully examining the particular way the government has gone about serving that interest. The Departments designed the challenged accommodation for eligible organizations fully cognizant of RFRA's mandate. *See* 78 Fed. Reg. at 39,886-88. As already described, the accommodation excuses eligible organizations from the contraceptive coverage requirement, severs them from any involvement in the separate contraceptive coverage to which the employees are entitled, and specifies that employees must be notified that the objecting organizations have no involvement in providing their contraceptive coverage.

Adverting to this accommodation in *Hobby Lobby*, the Supreme Court stressed that it alleviates the burden on the plaintiffs of having to provide contraceptive coverage and "serves HHS's stated interests equally well." *Hobby Lobby*, 134 S. Ct. at 2782. The Court described the accommodation as "an

alternative that achieves all of the Government's aims while providing greater respect for religious liberty." *Id.* at 2759; *see id.* at 2786 (Kennedy, J., concurring) (the "accommodation equally furthers the Government's interest but does not impinge on the plaintiff's religious beliefs"). In fact, the Court explained that the effect of the accommodation on women "would be precisely zero." *Id.* at 2760.

In determining whether the government has used the least restrictive means, the Supreme Court has instructed that we focus on the context of the religious objectors, and consider whether and how the government's compelling interest is harmed by "'granting specific exemptions to particular religious claimants.'" *Hobby Lobby*, 134 S. Ct. at 2779 (quoting *Gonzales v. O Centro Espírita Beneficiente Uniao Do Vegetal*, 546 U.S. 418, 431 (2006)). We must "look to the marginal interest in enforcing" the regulation to which the plaintiffs object. *Id.* (citing *O Centro*, 546 U.S. at 431).

The government's compelling interests in the contraceptive coverage requirement are met with the least imposition on religious exercise by allowing eligible organizations to opt out, but requiring them to identify themselves when they do. Only if the eligible organizations communicate that they are dropping contraceptive coverage from the health insurance they have arranged for their employees will the government be able to ensure that the resultant gaps in employees' coverage are otherwise filled. The government contends that its interests would be impaired if eligible organizations were entitled to exempt themselves from the contraceptive

coverage requirement without notifying either HHS, or their insurers or TPAs.

The government has an interest in the uniformity of the health care system the ACA put in place, under which all eligible citizens receive the same minimum level of coverage. Like the Social Security system at issue in *Lee*, the ACA "serves the public interest by providing a comprehensive insurance system with a variety of benefits available to all participants." 455 U.S. at 258. Contraceptive coverage must be effective if it is to serve the government's compelling interests, and the Departments were justified in concluding that, to be effective, the coverage must be provided to all women who want it, on the same terms as other preventive care. Providing contraceptive services seamlessly together with other health services, without cost sharing or additional administrative or logistical burdens and within a system familiar to women, is necessary to serve the government's interest in effective access. Imposing even minor added steps would dissuade women from obtaining contraceptives and defeat the compelling interests in enhancing access to such coverage. *See* 78 Fed. Reg. at 39,888.

The evidence shows that contraceptive use is highly vulnerable to even seemingly minor obstacles. Plaintiffs suggest that the government could offer tax deductions or credits for the purchase of contraceptive services, expand eligibility for existing federal programs that provide free contraception, allow women to submit receipts to the federal government for reimbursement, or provide incentives for pharmaceutical companies to provide contraceptives free of charge to women. Pls.' R. Br.

22. Those alternatives would substantially impair the government's interest. Plaintiffs' proposed alternatives each would add steps—requiring women to identify different providers or reimbursement sources, enroll in additional and unfamiliar programs, pay out of pocket and wait for reimbursement, or file for tax credits (assuming their income made them eligible)—or pose other financial, logistical, informational, and administrative burdens. *See* 78 Fed. Reg. at 39,888. Even assuming that any alternative program had or would develop the capacity to deal with an enormous additional constituency, it would not serve the government's compelling interest with anywhere near the efficacy of the challenged accommodation and would instead deter women from accessing contraception. *See id.*

Plaintiffs also dispute the government's compelling interest in applying the contraceptive coverage requirement to them on the ground that there is "no evidence" showing that Plaintiffs' employees lack access to or want contraception. Pls.' Supp'l Br. 16-17. The data upon which the government relies support its conclusion that women generally benefit from access to contraceptive coverage, and are unlikely to use such coverage when it is costly or complicated to obtain. *See* 78 Fed. Reg. at 39,887-88. There is no reason to believe that the health needs of Plaintiffs' employees or spouses and other covered beneficiaries in their families are materially different from those of other women. Religious nonprofits like the Plaintiff organizations employ millions of Americans—including individuals who do not share their beliefs. As the government recognized, "[e]mployers that do not primarily employ employees who share the religious tenets of the organization are

more likely to employ individuals who have no religious objection to the use of contraceptive services and therefore are more likely to use contraceptives." 77 Fed. Reg. at 8,728. The evidence justifying the contraceptive coverage requirement equally supports its application to Plaintiffs.

Accommodating religious entities need not come at the cost of the compelling interests the government program serves. When the interests of religious adherents collide with an individual's access to a government program supported by a compelling interest, RFRA calls on the government to reconcile the competing interests. In so doing, however, RFRA does not permit religious exercise to "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling." *Hobby Lobby*, 134 S. Ct. at 2786-87 (Kennedy, J., concurring); *see also id.* at 2781 n.37 ("It is certainly true that in applying RFRA 'courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.'"). The opt out offered to religious adherents allows the government to further its compelling interests with the least restriction on religious exercise. Under the accommodation, eligible organizations are relieved of the obligation to include contraceptive coverage in their health care plans, but "women would still be entitled to all FDA-approved contraceptives without cost sharing." *Id.* at 2760. Allowing eligible organizations to exempt themselves completely from the contraceptive coverage requirement, without so much as notifying their plan or HHS that they have done so, would undermine the government's interest in the breadth of the scheme established in the ACA.

The government's interest in a comprehensive, broadly available system is not undercut by the other exemptions in the ACA, such as the exemptions for religious employers, small employers, and grandfathered plans. The government can have an interest in the uniform application of a law, even if that law allows some exceptions. *See, e.g.*, *Lee*, 455 U.S. at 261. In any event, the exemptions to the ACA are limited and the rationales that support them do not extend to exempting Plaintiffs. Currently, only religious employers' plans and grandfathered health plans (employer health plans that existed prior to March 23, 2010, and that have not made particular changes after that date) are not required to include coverage for preventive services. 42 U.S.C. § 18011(a), (e). Religious employers are exempt from the contraceptive coverage provision because the government reasonably assumed that if the church opposed contraception, the church's employees would, too. *See* 77 Fed. Reg. at 8,728. The exception for grandfathered plans sought to limit disruption by enabling individuals temporarily to maintain their health care coverage as it existed prior to enactment of the ACA. That exception is a transitional measure and will be eliminated as employers make changes to their health care plans. *See* 45 C.F.R. § 147.140(g) (a health plan ceases to be a grandfathered plan when it eliminates benefits, increases cost-sharing requirements, or changes its employer-contribution terms). According to HHS estimates, 66 percent of small-employer plans and 45 percent of large-employer plans were expected to lose their grandfathered status by the end of 2013.[25] 75 Fed.

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[25] According to a 2013 study conducted by Kaiser Health News,

Reg. 34,538, 34,552 (June 17, 2010). The exemption for small employers (those with fewer than 50 employees) is not an exemption from the contraceptive coverage requirement, but from the requirement to provide any health insurance to their employees. 26 U.S.C. § 4980H(c)(2). Employees who do not get insurance through their jobs because they work for exempt small employers are eligible to purchase it through the exchanges, where all listed plans are required to cover contraceptive services without cost sharing. None of the three exemptions is analogous to what the Plaintiffs here seek.

* * *

The accommodation is the least restrictive method of ensuring that women continue to receive contraceptive coverage in a seamless manner while simultaneously relieving the eligible organizations of any obligation to provide such coverage. Because the government has used the least restrictive means possible to further its compelling interest, RFRA does not excuse Plaintiffs from their duty under the ACA either to provide the required contraceptive coverage or avail themselves of the offered accommodation to opt out of that requirement. The accommodation meets the twin aims of respecting religious freedom and ensuring that women continue to receive

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the grandfathering is already quickly phasing down. Thirty-six percent of individuals who receive health care coverage through their employer in 2013 were enrolled in a grandfathered health plan, as compared to 48 percent in 2012 and 56 percent in 2011. *Employer Health Benefits: 2013 Annual Survey*, Kaiser Family Foundation and Health Research & Educational Trust, at 221, *available at* http://kaiserhealthnews.files.wordpress.com/2013/11/8465- employer-health-benefits-20131.pdf.

contraceptive coverage without administrative, financial, or logistical burdens. The regulations thus respond appropriately to RFRA's explicit demand for "sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. § 2000bb(a)(5).

V. Constitutional Claims

Plaintiffs raise several constitutional challenges to the regulations. We address each in turn, concluding that the regulations do not violate any of the constitutional provisions identified by Plaintiffs.

A. Free Exercise of Religion

Plaintiffs claim that the contraceptive coverage requirement violates the Free Exercise Clause of the First Amendment because it categorically exempts houses of worship from the contraceptive coverage requirement and temporarily relieves grandfathered plans from the requirement to cover any preventive services without cost sharing, while not similarly exempting Plaintiffs. The Free Exercise Clause embodies a "fundamental nonpersecution principle." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993). But it "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Smith*, 494 U.S. at 879 (internal quotation marks omitted). A Free Exercise Clause challenge, in contrast to a claim under RFRA, receives strict scrutiny only if the challenged law is either not neutral or not generally applicable. *See Lukumi Babalu*, 508 U.S. at 531. We have held that the

regulations comply with RFRA; they readily satisfy the less stringent free exercise standard.

"Neutrality and general applicability are interrelated," but distinct. *Id.* A law is not neutral if it facially "refers to a religious practice without a secular meaning discernable from the language or context," or if "the object of a law is to infringe upon or restrict practices because of their religious motivation." *Id.* at 533. A law is not generally applicable if, "in a selective manner," it "impose[s] burdens only on conduct motivated by religious belief." *Id.* at 543.

Plaintiffs do not contend that the challenged contraceptive coverage requirement is religiously non-neutral on its face, nor that it was enacted for an anti-religious purpose, but that the exemptions provided to houses of worship and grandfathered plans render the contraceptive coverage requirement non-neutral and not generally applicable. Those exemptions, however, do not impugn the contraceptive coverage requirement's neutrality and generality: it is both, in the relevant sense of not selectively targeting religious conduct, whether facially or intentionally, and broadly applying across religious and nonreligious groups alike. *See Mich. Catholic Conf.*, 755 F.3d at 394; *RCAW*, 2013 WL 6729515, at *27-31; *Priests for Life*, 7 F. Supp. 3d at 105-07.

The contraceptive coverage requirement is a religiously neutral part of a national effort to expand health coverage and make it more efficient and effective. The ACA's limited or temporary exemptions do not amount to the kind of pattern of exemptions from a facially neutral law that

demonstrate that the law was motivated by a discriminatory purpose. *See supra* Section IV.B.2. The Florida prohibition on animal killing invalidated in *Lukumi Babalu*, by contrast, responded to the opening of a Santeria church, which practiced religious animal-sacrifice rituals. 508 U.S. at 524. The ordinance elaborated a putatively general prohibition on animal killings with specific disapproval of killing for "sacrifice" as part of "any type of ritual," while exempting as "necessary" killings for sport hunting, slaughtering animals to eat them, eradication of pests, and euthanasia—killings that were "no more necessary or humane" than the forbidden Santeria sacrifices. *Id.* at 536-37. That exemption for so many non-religious types of animal killing helped to make clear that "suppression of the central element of the Santeria worship service was the object of the ordinances." *Id.* at 534. The exemptions in the ACA do not single out any religion and are wholly consistent with the law's neutral purpose. Indeed, the existence of an exemption for religious employers substantially undermines contentions that government is hostile toward such employers' religion.[26]

The contraceptive coverage requirement also does not target religious organizations, but applies across

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[26] *See, e.g.*, RCAW, 2013 WL 6729515, at *28 (availability of the religious employer exemption "cuts against the conclusion that the contraceptive mandate was specifically designed to oppress those of the Catholic faith as plaintiffs suggest"); *Catholic Diocese of Nashville v. Sebelius*, No. 3:13-01303, 2013 WL 6834375, at *6 (M.D. Tenn. Dec. 26, 2013) (noting that exemption for religious employers and accommodation for eligible organizations "evidences an intent, not to burden Plaintiffs' religious beliefs, but to recognize and respect them").

the board. The exemptions do not render the law so under-inclusive as to belie the government's interest in protecting public health and promoting women's well-being or to suggest that disfavoring Catholic or other pro-life employers was its objective. *See RCAW*, 2013 WL 6729515, at *30. For example, the Supreme Court has held that, despite statutory exemptions for self-employed Amish employers, the social security system was "uniformly applicable to all." *United States v. Lee*, 455 U.S. 252, 260-61 (1982); *see also id.* at 262 (Stevens, J., concurring in the judgment) (describing the challenged law as "a valid tax law that is entirely neutral in its general application"). As the Sixth Circuit recently explained: "General applicability does not mean absolute universality." *Mich. Catholic Conf.*, 755 F.3d at 394 (internal quotation marks omitted).

Plaintiffs contend that the ACA's exemptions make it under-inclusive in a way that suggests that the government believes that "secular motivations [for providing an exemption] are more important than religious motivations," Pls.' Br. 50 (internal quotation marks omitted), evidencing that the government "devalues religious reasons," Pls.' R. Br. 25 (internal quotation marks omitted). But, for the same reasons the exemptions do not undermine the government's interest in a uniform system, *see supra* Section IV.B.2, the exemptions do not demonstrate the government's hostility toward religious concerns.

Because the contraceptive coverage requirement is a neutral law of general applicability, Plaintiffs' free exercise claim fails.

B. Expressive Association

The *Priests for Life* Plaintiffs argue that the contraceptive coverage requirement violates their First Amendment rights to expressive association, which protects the "right to associate for the purpose of speaking." *See Rumsfeld v. Forum for Academic & Institutional Rights*, Inc. (FAIR), 547 U.S. 47, 68 (2006). The regulations infringe that right, the *Priests for Life* Plaintiffs contend, by requiring them to promote the government's immoral objective of expanding access to contraceptives, which undermines the organization's "very reason for its existence." Pls.' Br. 51. The *Priests for Life* Plaintiffs base their expressive association claim, like their RFRA claim, on a misreading of what the regulations require of them, suggesting that the regulations require them to disclose the identities of their employees and plan beneficiaries. *See, e.g.*, Pls.' Br. 52-53. They do not.

A law may violate the First Amendment right to expressive association where it directly interferes with an expressive association's membership decisions or where it indirectly affects the group's composition by making membership less attractive. *FAIR*, 547 U.S. at 69. In *FAIR*, the Supreme Court held that a law requiring law schools receiving federal funds to give military recruiters access to the schools' facilities equal to the access it afforded other recruiting employers did not violate the objecting schools' rights to associate. *Id.* at 69-70. The law schools' non-discrimination policies prohibited discrimination based on sexual orientation, and, because the United States Military refused at that time to hire any openly gay or lesbian applicants, the

law schools were strongly opposed to hosting military recruiters and actively facilitating their access to the schools' students. The Court rejected that claim, holding that the military recruiters' presence on campus "does not violate a law school's right to associate, regardless of how repugnant the law school considers the recruiter's message." *Id.* at 70. The Court acknowledged that the plaintiffs there had to "'associate' with military recruiters in the sense that they interact with them," but held that, because the recruiters were as an institutional matter outsiders who would "come onto campus for the limited purpose of trying to hire students," they did not impinge on the schools' expressive association. *Id.* at 69.

The same is true here: the *Priests for Life* Plaintiffs object to interacting with coverage providers that must make contraceptive coverage available, but such interaction does not make those providers part of the organization's expressive association or otherwise impair its ability to express its message. Just as the students and faculty in *FAIR* remained "free to associate to voice their disapproval of" the military's policy against gays or lesbians serving openly in the military, *id.* at 69-70, Priests for Life's members and employees remain free to associate with each other to promote their religious views on contraception and other matters, and to voice their disapproval of health-care products and services that they believe to be immoral. "Nothing in the[] final regulations prohibits an eligible organization from expressing its opposition to the use of contraceptives." 78 Fed. Reg. at 39,880 n.41. Accordingly, the *Priests for Life* Plaintiffs' expressive association claim fails.

C. Compelled Speech

It is "a basic First Amendment principle that freedom of speech prohibits the government from telling people what they must say." *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013) (internal quotation marks omitted); *see Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2282 (2012) ("The government may not . . . compel the endorsement of ideas that it approves."). Plaintiffs contend that the regulations impermissibly compel their speech in three ways.

First, Plaintiffs claim that the regulations require them to authorize and facilitate health care coverage for counseling that encourages and promotes contraception, in violation of their right against compelled speech. Plaintiffs appear to contend that the regulations commandeer them to echo or facilitate the words of medical professionals who might communicate to insured women the availability and potential appropriateness of various contraceptive methods. But the regulations do not require Plaintiffs to communicate any pro-contraceptive-coverage message, nor to authorize or facilitate counseling in favor of contraception. *See supra* Section IV.A.2; *Mich. Catholic Conf.*, 755 F.3d at 391. They leave Plaintiffs free to voice their opposition to contraception.

Plaintiffs' reliance on *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011), is misplaced. *Arizona Free Enterprise Club* concerned a state campaign finance law under which candidates for state office who accepted public funding could receive additional state funds in the event that privately financed candidates and

independent expenditure groups exceeded spending limits. *See id.* at 2813. Under Arizona's law, the volume of political expenditures by or in support of a privately financed candidate triggered funding to his or her opponent. *See id.* at 2818-19. Plaintiffs' completion of the self-certification form has no similar triggering role, and there is no interest or effect here to level competing voices, which was a significant aspect of the constitutional infirmity of Arizona's campaign finance law. *See id.* at 2825. Furthermore, contrary to Plaintiffs' argument, nothing in *Arizona Free Enterprise Club* suggests that the prohibition on compelling a party to "help disseminate hostile views" the party opposes, *id.* at 2821 n.8 (internal quotation marks omitted), applies to laws that require a party to engage in non-expressive behavior, such as the provision of health insurance.

Second, Plaintiffs argue that completing the self-certification form requires them to express a particular view, namely, that they oppose providing their plan participants with coverage for contraceptive services, and that it deprives them of the freedom to speak on this issue on their own terms.[27] The self-certification form and alternative notice are the methods through which Plaintiffs can opt out of the requirement to provide their employees with health insurance coverage for contraceptive services. The filing of the form, though it may include "elements of speech," is "a far cry from the

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[27] Plaintiffs' briefing contends only that their speech is impermissibly compelled by the self-certification form, and does not address their compelled speech claim to the alternative notice.

compelled speech" that the Supreme Court previously has found to be unconstitutional. *FAIR*, 547 U.S. at 61-62 (citing *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943), and *Wooley v. Maynard*, 430 U.S. 705, 717 (1977)). Just as the compelled speech that the law schools identified in *FAIR* was "plainly incidental to the Solomon Amendment's regulation of conduct," *id.* at 62, any speech required by the self-certification or alternative notice is similarly incidental to the accommodation's regulation of conduct. Compelling an organization to send a form to a third party to claim eligibility for an exemption "is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or Die,' and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is." *Id.* Requiring Plaintiffs to give notice that they wish to opt out of the contraceptive coverage requirement no more compels their speech in violation of the First Amendment than does demanding that a conscientious objector self-identify as such.

The regulations do nothing to deprive Plaintiffs of "the freedom to speak on the issue of abortion and contraception on their own terms, at a time and place of their own choosing." Pls.' Br. at 55. Completing the self-certification form does not limit what Plaintiffs may say about contraception—or any other topic—nor does it limit where, when, or how they may say it. *See Mich. Catholic Conf.*, 755 F.3d at 392. Indeed, unlike the law schools in *FAIR* that had to host military recruiters and thus might have mistakenly been viewed as endorsing the military's discriminatory recruitment approach, the opt out here is designed to ensure that Plaintiffs do not have to express, in words or symbolic backing, any support

for contraception. *Cf. FAIR*, 547 U.S. at 64-65 (government is limited in its "ability to force one speaker to host or accommodate another speaker's message" where accommodating that message interferes with the plaintiff's desired message).

Finally, Plaintiffs object to the regulations because they require that Plaintiffs' plan participants receive notice of the availability of payments for contraceptive services. Thus, according to Plaintiffs, the regulations coerce them to provide access to their plan participants and either create the appearance that Plaintiffs agree with the notification or call on them to respond to the notice to inform participants of Plaintiffs' objections to contraception.

But the regulations actually require quite the contrary: the plan issuer or TPA must send a message explicitly distancing the employer from the offered contraceptive coverage, and do so in a completely separate mailing from any communication regarding the employer-sponsored plan. 45 C.F.R. § 147.131(d) (insured group health plans); 29 C.F.R. § 2590.715-2713A(d) (self-insured plans). The regulations, therefore, take care to inform plan participants that the coverage for contraceptives is not paid for, administered by, or connected to Plaintiffs. That is a long way from unconstitutionally compelling Plaintiffs to speak.[28]

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[28] The *RCAW* Plaintiffs challenged the regulations' "non-interference" provision as an unconstitutional speech restriction, but as that provision has been rescinded, their challenge is moot. The provision originally barred self-insured employers from "directly or indirectly, seek[ing] to influence the [TPA's] decision" to provide or arrange separate payments for contraceptive services. 79 Fed. Reg. at 51,095. The government interpreted

D. Establishment of Religion

Plaintiffs advance two Establishment Clause claims. They first contend that the regulations impermissibly discriminate between types of religious institutions by making a general distinction, familiar in tax law, between churches and other houses of worship (which are automatically exempt), and nonprofit organizations that may have a religious character or affiliation, such as universities and hospitals (which may use the accommodation to opt out). 26 U.S.C. § 6033(a)(3)(A)(i), (iii) (exempting "churches, their integrated auxiliaries, and conventions or associations of churches," and "the exclusively religious activities of any religious order" from an annual return filing requirement). Second, they contend that the regulations entail excessive entanglement between the government and religious institutions. Specifically, to the extent that the regulations seek to be more nuanced and context specific, looking at specific attributes of each organization in an effort accurately to distinguish among them, Plaintiffs contend the government

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that bar as applicable only to the use of bribery, threats, or coercion to dissuade or hinder a TPA from fulfilling its legal obligation to provide contraceptive coverage. *Id.* The government has now rescinded the non-interference provision in its entirety. *Id.* Plaintiffs maintain that they still challenge the non-interference provision "to the extent the Government contends it continues to be unlawful to 'say to the[ir] TPA, if you don't stop making the payments for contraceptives, we're going to fire you.'" Pls.' Supp'l Br. 27 n.12 (internal brackets omitted). As the government asserted at oral argument, however, even when the non-interference provision was in effect, Plaintiffs were free to fire their insurers or TPAs as they wished. Oral. Arg. Tr. at 46:15-48:1.

impermissibly interferes with internal church governance.

The regulations draw a long-recognized and permissible distinction between houses of worship and religious nonprofits. The Seventh Circuit, in rejecting a similar challenge to the contraceptive coverage regulations, noted that "religious employers, defined as in the cited regulation, have long enjoyed advantages (notably tax advantages) over other entities, without these advantages being thought to violate the establishment clause." *Notre Dame*, 743 F.3d at 560 (internal citation omitted). The churches gained the categorical exemption on the assumption that the relatively small numbers of employees who are employed by a church will, if their church's mission opposes contraception, be ministers or clerics likely to share that view, or at least have knowingly joined a pervasively sectarian institution that expects them to. 77 Fed. Reg. at 8,728. The categorical exemption was not extended to the broader group of religious nonprofits, however, because religiously affiliated hospitals, universities and social service agencies employ a wide range of people of diverse faiths and are thus "more likely to employ individuals who have no religious objection to the use of contraceptive services and therefore are more likely to use contraceptives." *Id.* Limiting the exemption, but making the opt out available, limits the burdens that flow from organizations "subject[ing] their employees to the religious views of the employer." *Id.*

Plaintiffs equate the familiar regulatory distinction between houses of worship and religiously affiliated organizations, based on organizational form and purpose, with constitutionally impermissible

distinctions based on denomination. They quote *Larson v. Valente*, 456 U.S. 228, 231-32, 246 n.23 (1982) and *Colorado Christian University v. Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008), for the notion that the Establishment Clause forbids distinguishing between "types of institutions" as surely as between "sects or denominations." Pls.' Br. 57-58 (internal quotation marks omitted). Both of the cases Plaintiffs rely on, however, were concerned with lines drawn based on denomination, rather than organizational form or purpose.[29] In *Larson*, the Supreme Court invalidated a state law that imposed special registration requirements on churches that received a majority of their donations from non-members because it facially discriminated against religious denominations that were newer or chose to rely on public solicitation rather than financial support from members. 456 U.S. at 246-48. The distinction invalidated in *Colorado Christian* authorized public scholarships for students at Methodist and Roman Catholic universities while refusing them to students attending non-denominational evangelical Protestant or Buddhist universities. *See* 534 F.3d at 1258. The *Colorado Christian* court contrasted that denominational discrimination with the permissible exclusion "of all devotional theology majors equally." *Id.* at 1256 (citing *Locke v. Davey*, 540 U.S. 712, 715-16 (2004)). This Court in *University of Great Falls v. NLRB*, 278

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[29] Indeed, the Plaintiffs' argument would call into question the tax advantages that have long been available to houses of worship, but not other types of religious organizations. Those tax advantages have not been thought to violate the Establishment Clause. *See Notre Dame*, 743 F.3d at 560.

F.3d 1335, 1343 (D.C. Cir. 2002), similarly invalidated a regulatory line that effectively asked whether certain schools were "*sufficiently* religious" to be exempt from NLRB jurisdiction, administration of which line had drawn the government into questioning whether the university "was legitimately 'Catholic.'" *Id.* *University of Great Falls* favors a test relying on more objective factors about the institution's structure and activities. *Id.* The regulations at issue here draw distinctions based on organizational form and purpose, and not religious belief or denomination, in keeping with *Larson*, *Colorado Christian*, and *University of Great Falls*. *See also Mich. Catholic Conf.*, 755 F.3d at 395; *Notre Dame*, 743 F.3d at 560.

Additionally, Plaintiffs assert that the regulations violate the Establishment Clause because they believe they call on the government impermissibly to "'troll[] through a person's or institution's religious beliefs.'" Pls.' Br. 60 (quoting *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion)). The regulations define a "religious employer" as "an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended." 45 C.F.R. § 147.131(a); *see also* 78 Fed. Reg. at 8,461 (stating that the exemption is restricted primarily to "churches, synagogues, mosques, and other houses of worship, and religious orders"). The IRS has developed a non-exhaustive, non-binding list of fourteen factors to consider when determining whether an entity is in fact a religious employer. *See Am. Guidance Found., Inc. v. United States*, 490 F. Supp. 304, 306 n.2 (D.D.C. 1980);

Found. of Human Understanding v. United States, 88 Fed. Cl. 203, 220 (2009).

Plaintiffs contend that, in order to determine whether an entity is in fact a religious employer, the government asks intrusive questions about its religious beliefs in violation of the Establishment Clause. They complain that the IRS factors "favor some types of religious groups over others" and that "they do so on the basis of intrusive judgments regarding beliefs, practices, and organizational structures." Pls.' Br. at 61. It is undisputed in this case that the Archdiocese is a religious employer, and no other Plaintiff contends that it was improperly denied religious-employer treatment. As a result, Plaintiffs do not challenge a determination that has been made using those factors, nor can they argue that the factors were impermissibly applied to them. Therefore, we agree with the district court that this challenge is not ripe for review. *RCAW*, 2013 WL 6729515 at *43-44.

E. Internal Church Governance

Relying on *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012), the *RCAW* Plaintiffs allege that the regulations violate the Religion Clauses of the First Amendment by impermissibly interfering with matters of internal church governance. They claim that the regulations "artificially split[]" the Catholic Church in two—into the Archdiocese (an exempt religious employer) and its related nonprofit organizations—and prevent the Archdiocese from "ensur[ing] that these organizations offer health plans consistent with Catholic beliefs." Pls.' Br. at 63-64. Neither *Hosanna-Tabor*, nor any other precedent interpreting

either of the Constitution's Religion Clauses, supports this novel claim.

The ACA's regulations do not address religious governance at all. The regulations' separate treatment of functions that Plaintiffs might prefer to group together does not interfere with how the Plaintiffs govern themselves internally. Plaintiffs invoke *Hosanna-Tabor*, but that case does not stand for Plaintiffs' proposition that the First Amendment precludes application of a law simply because it may affect different types of religious institution differently.

In *Hosanna-Tabor*, the Supreme Court recognized a "ministerial exception, grounded in the First Amendment, that precludes application of [Title VII and other employment discrimination laws] to claims concerning the employment relationship between a religious institution and its ministers." 132 S. Ct. at 705 (internal quotation marks omitted); *see id.* at 710. The Court expressly limited its holding to "an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her." *Id.* The language from *Hosanna-Tabor* that plaintiffs invoke, used there in the context of disapproving judicial review of ministers' discrimination claims because it would interfere "with an internal church decision that affects the faith and mission of the church itself," *id.* at 707, does not apply here. Unlike in that case, nothing about the regulation challenged here would "depriv[e] the church of control over the selection of those who [would] personify its beliefs"—the Church's own ministers. *Id.* at 706. The Court's reasoning in *Hosanna-Tabor* does not extend beyond ecclesiastical

employment matters to regulations that may affect a church's decision about its health care plan. Accordingly, the church-governance claim must fail.

F. Equal Protection

The *Priests for Life* Plaintiffs argue that the regulations violate equal protection as guaranteed by the Fifth Amendment, by discriminating on the basis of religion and impinging on their fundamental rights. This claim is largely duplicative of Plaintiffs' Establishment Clause challenge and fails for similar reasons. The *Priests for Life* Plaintiffs cite no case in support of their contention that alleged discrimination between types of religious organizations within a denomination gives rise to an equal protection claim. Additionally, as the district court observed, the *Priests for Life* Plaintiffs' fundamental rights claim is identical to their other First Amendment claims. *Priests for Life*, 7 F. Supp. 3d at 110. Because we have rejected those claims, we apply rational basis scrutiny to the regulations. *See Locke v. Davey*, 540 U.S. 712, 720 n.3 (2004) (applying rational-basis scrutiny to an Equal Protection Clause claim alleging discrimination based on religion where the plaintiffs' Free Exercise Clause challenge failed). Because, as discussed *supra* Section IV.B, the regulations survive strict scrutiny, they necessarily survive this more limited form of review.

VI. Administrative Procedure Act

The *RCAW* Plaintiffs contend that the government violated the Administrative Procedure Act by erroneously interpreting the exemption to apply on an employer-by-employer basis, rather than a plan-

by-plan basis. The regulations state that the HRSA "may establish an exemption from [the regulations] with respect to a group health plan established or maintained by a religious employer (and health insurance coverage provided in connection with a group health plan established or maintained by a religious employer) with respect to any requirement to cover contraceptive services under such guidelines." 45 C.F.R. § 147.131(a). With respect to "multiple employer plans"—plans established or maintained by an exempt religious employer as well as non-exempt organizations—the Departments concluded that "the availability of the exemption or an accommodation [will] be determined on an employer-by-employer basis." 78 Fed. Reg. at 39,886. This means that "each employer [is] required to independently meet the definition of religious employer or eligible organization in order to avail itself of the exemption or an accommodation." *Id.*

An agency's interpretation of its own regulation is entitled to substantial deference. *Auer v. Robbins*, 519 U.S. 452, 461 (1997). The *RCAW* Plaintiffs contend that such deference is not appropriate here, however, for two reasons. First, they argue that, contrary to the government's contention, the regulation unambiguously states that the exemption applies on a plan-by-plan basis. *See Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000) ("*Auer* deference is warranted only when the language of the regulation is ambiguous."). The regulation, however, is silent as to whether the exemption will apply on an employer-by-employer basis or a plan-by-plan basis. It uses the phrase "group health plan," because the contraceptive-coverage requirement applies to group health plans (as opposed to employers), not because

the regulatory unit for purposes of the exemption is the plan rather than the employer. Because the regulation does not speak to that issue, we reject the *RCAW* Plaintiffs' claim that the Departments' interpretation is not entitled to deference.

Second, the *RCAW* Plaintiffs assert that deference to the Departments' interpretation is not warranted because it conflicts with a prior interpretation put forth by the government. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) ("[D]eference is likewise unwarranted when there is reason to suspect that the agency's interpretation 'does not reflect the agency's fair and considered judgment on the matter in question.' This might occur when the agency's interpretation conflicts with a prior interpretation . . . ." (internal citations omitted)). But the Departments have not changed their position. When they issued the Notice of Proposed Rulemaking regarding "Coverage of Certain Preventive Services Under the Affordable Care Act," the Departments made clear that they intended the exemption to apply on an employer-by-employer basis. *See* 78 Fed. Reg. at 8,467. ("The Departments propose to make the accommodation or the religious employer exemption available on an employer-by-employer basis. That is, each employer would have to independently meet the definition of eligible organization or religious employer in order to take advantage of the accommodation or the religious employer exemption with respect to its employees and their covered dependents."). The language on which the *RCAW* Plaintiffs rely to demonstrate that the Departments have changed their position does not support their argument. *See* 77 Fed. Reg. 16,501, 16,502 (Mar. 21, 2012). All they point to is a

hypothetical that specifies that an exempt religious school is categorically exempt from the contraceptive coverage requirement, whether it establishes and maintains its own plan or offers its employees coverage through a plan established by the exempt religious diocese with which it is affiliated. *See id.* Thus, contrary to the *RCAW* Plaintiffs' contention, the Departments' interpretation that the exemption applies on an employer-by-employer basis does not conflict with its earlier interpretation of the regulation, and is entitled to *Auer* deference.

Finally, in their supplemental brief, Plaintiffs contend that the government lacked the "good cause" required to promulgate the interim final rule without notice and comment. *See* 5 U.S.C. § 553(b)(3)(B) (authorizing promulgation of interim final rules without notice and comment when the agency finds on the record "that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."). Several reasons support HHS's decision not to engage in notice and comment here. First, the agency made a good cause finding in the rule it issued. *See* 79 Fed. Reg. at 51,095-96. Second, the regulations the interim final rule modifies were recently enacted pursuant to notice and comment rulemaking, and presented virtually identical issues; moreover, HHS will expose its interim rule to notice and comment before its permanent implementation. *See* 5 U.S.C. § 553(b)(3)(B) (good cause exists when "notice and public procedure . . . are . . . unnecessary"). Third, the modifications made in the interim final regulations are minor, meant only to "augment current regulations in light of the Supreme Court's interim order in connection with an application for an

injunction in *Wheaton College*." 79 Fed. Reg. at 51,092; *see also Tenn. Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1144 (D.C. Cir. 1992) ("We have . . . indicated that the less expansive the interim rule, the less the need for public comment."). The government reasonably interpreted the Supreme Court's order in *Wheaton College* as obligating it to take action to further alleviate any burden on the religious liberty of objecting religious organizations. *See* 79 Fed. Reg. at 51,095-96; *see also Am. Fed'n of Gov't Emp., AFL-CIO v. Block*, 655 F.2d 1153, 1155-57 (D.C. Cir. 1981) (validating promulgation of interim rule without notice and comment because, *inter alia*, it would comply with a court order). As the agency explained, delay in implementation of the rule would interfere with the prompt availability of contraceptive coverage and delay the implementation of the alternative opt-out for religious objectors. *See* 5 U.S.C. § 553(b)(3)(B) (good cause exists when "notice and public procedure . . . are . . . contrary to the public interest").

* * *

In sum, we reject all of Plaintiffs' challenges to the regulations. Accordingly, we affirm the district court's opinion in *Priests for Life* in its entirety. As to the *RCAW* decision, we vacate the district court's grant of summary judgment for Thomas Aquinas and its holding as to the unconstitutionality of the non-interference provision, and affirm the remainder of the decision.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, *et al.*, Plaintiffs, v. KATHLEEN SEBELIUS, Secretary, U.S. Department of Health and Human Services, *et al.*, Defendants.	Civil Action No. 13-1441 (ABJ)

MEMORANDUM OPINION

This case concerns the requirements imposed on certain employers under the Affordable Care Act to offer healthcare plans to their employees that provide cost-free coverage for contraceptive services. Plaintiffs the Roman Catholic Archbishop of Washington ("the Archdiocese"), the Consortium of Catholic Academies of the Archdiocese of Washington, Inc., Archbishop Carroll High School, Inc., Don Bosco Cristo Rey High School of the Archdiocese of Washington, Inc., Mary of Nazareth Roman Catholic Elementary School, Inc., Catholic Charities of the Archdiocese of Washington, Inc., Victory Housing, Inc., the Catholic Information Center, Inc., Catholic University of America, and Thomas Aquinas College have filed this case against defendants Kathleen Sebelius, the Secretary of Health and Human

Services; Thomas Perez, the Secretary of Labor; Jacob Lew, the Secretary of the Treasury; the U.S. Department of Health and Human Services; the U.S. Department of Labor; and the U.S. Department of the Treasury. In their complaint, plaintiffs allege that the contraceptive mandate violates the Religious Freedom Restoration Act ("RFRA") as applied to them, as well as the Free Exercise Clause, the Free Speech Clause, and the Establishment Clause of the First Amendment to the U.S. Constitution. Compl. ¶¶ 237–312 [Dkt. # 1]. They also assert that defendants violated the Administrative Procedure Act and advanced an erroneous interpretation of the religious employer exemption to the mandate when they adopted the contraceptive mandate in its final form. *Id.* ¶¶ 313–39.

Plaintiffs filed a motion for preliminary injunction in light of the impending January 1, 2014 contraceptive mandate enforcement date. Pls.' Mot. for Prelim. Inj. [Dkt. # 6]. Pursuant to Federal Rule of Civil Procedure 65(a)(2), this Court consolidated the motion with the merits on September 26, 2013. Defendants filed a motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) and to dismiss plaintiffs' Establishment Clause count under Federal Rule of Civil Procedure 12(b)(1). Defs.' Mot. to Dismiss or, in the alt., for Summ. J. ("Defs.' Mot.") [Dkt. # 26]; Defs.' Mem. in Supp. of Mot. to Dismiss or, in the alt., for Summ. J. ("Defs.' Mem.") [Dkt. # 26-1]. They also moved, in the alternative, for summary judgment under Federal Rule of Civil Procedure 56. Defs.' Mot. at 1; Defs.' Mem. at 9. Plaintiffs then filed a cross-motion for summary judgment. Pls.' Opp. & Cross-Mot. for Summ. J. ("Pls.' Opp. & Cross-Mot.") [Dkt. # 27-1]. The case

has been fully briefed, and the Court held oral argument on November 22, 2013.

For the reasons stated below, the Court will grant defendants' motion for summary judgment with respect to Catholic University's RFRA claim in Count I, and all of the plaintiffs' Free Exercise claims in Count II, compelled speech claims in Count III, denominational preference claims in Count V, internal church governance claims in Count VI, and APA contrary to law claims in Count VII.[1] The Court will also grant defendants' motion to dismiss the RFRA claims in Count I that are advanced by those plaintiffs who are covered under the Archdiocese's healthcare plan, and all of the plaintiffs' Establishment Clause challenges to the IRS factors in Count V and APA erroneous interpretation claims in Count VIII for lack of jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). Finally, the Court will grant Thomas Aquinas College's cross-motion for summary judgment on its RFRA claim in Count I, and all of the plaintiffs' cross-motions for summary judgment on their Free Speech claims asserted in Count IV.

Plaintiffs allege that the contraceptive mandate burdens their religious exercise because it requires them "to provide, pay for, and/or facilitate access to abortion-inducing products, contraception,

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[1] Although defendants' motion is styled as a motion to dismiss, or in the alternative, for summary judgment, the Court will decide those claims for which it has jurisdiction under the summary judgment standard because plaintiffs have alleged enough facts to satisfy *Iqbal*'s and *Twombly*'s pleading requirements. *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

sterilization procedures, and related counseling, in a manner that is directly contrary to their religious beliefs." Compl. ¶ 241. This is practically identical to the claim that the Archdiocese and four of the other plaintiffs advanced in the suit they filed in this Court in May of 2012. *See Roman Catholic Archbishop of Washington v. Sebelius*, No. 12-0815, Compl. ¶ 181 [Dkt. # 1] ("The U.S. Government Mandate requires Plaintiffs to provide, pay for, and/or facilitate practices and speech that are contrary to their religious beliefs."). Plaintiffs' religious beliefs remain the same, but in the interim, the law has changed. Defendants have created an accommodation for the specific purpose of alleviating the burden that the mandate imposes on religious organizations that are not entirely exempt. And in the case of all but one of the plaintiffs – the self-insured Thomas Aquinas College – the Court finds that the law no longer requires plaintiffs to provide, pay for, or facilitate access to contraception. Thus, it does not require plaintiffs to "modify [their] behavior and to violate [their] beliefs," as the Supreme Court defined an unacceptable burden more than thirty years ago in *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 718 (1981), or to "meaningfully approve and endorse the inclusion of contraceptive coverage" in their plans, as the D.C. Circuit described the burden in the context of the mandate without the accommodation just last month. *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1217 (2013).

Religious organizations like Catholic University – that offer health insurance to their employees through an insured group plan – may avail themselves of the accommodation simply by

memorializing their objection to the mandate in writing. The insurer is obligated under the rules to exclude the coverage from the University's plan and to provide and pay for the coverage itself, and therefore, as the Court explains in detail below, Catholic University has no grounds for a RFRA claim. Plaintiffs contend that the act of self-certifying – an act that consists of nothing more than plaintiffs' reiteration of their already public objection to participation in the requirements of the mandate – is a substantial burden on the exercise of their religion in and of itself. But that argument so blurs the demarcation between what RFRA prohibits – that is, governmental pressure to modify one's own behavior in a way that would violate one's own beliefs – and what would be an impermissible effort to require others to conduct their affairs in conformance with plaintiffs' beliefs, that it obscures the distinction entirely. RFRA was enacted to shield religious adherents from governmental interference with their own religious exercise and to protect them from being required to perform odious acts themselves. Plaintiffs articulate this distinction clearly: "Plaintiffs simply invoke RFRA to vindicate the principle that the Government may not force them, *in their own conduct*, to take actions that violate their religious conscience." Pls.' Mem. in Supp. of Mot. for Prelim. Inj. ("Pls.' Mot.") at 20 [Dkt # 6-1]. Since the rules that apply in the insured group plan context do not involve that compulsion, they survive the RFRA challenge. RFRA is not a mechanism to advance a generalized objection to a governmental policy choice, even if it is one sincerely based upon religion.

But Thomas Aquinas College is covered by the set of regulations directed towards religious

organizations that are self-insured, and unlike all of the other plaintiffs with self-insured plans, Thomas Aquinas College does not offer its employees coverage through a plan offered by the church, which cannot be compelled to comply with the mandate. In the case of a self-insured entity like Thomas Aquinas, the newly enacted regulations fall short of the mark. Since the accommodation imposes a duty upon the religious organization to contract with a willing third-party administrator that will arrange for the payments for contraceptives, they compel the organization to take affirmative steps – to *do* something – that is in conflict with the tenets of its faith. And therefore, defendants are enjoined from enforcing the mandate against Thomas Aquinas College.

RFRA involves the application of a more lenient standard than the one that applies under the First Amendment, though, and all of the plaintiffs have failed to establish any violation of the Free Exercise Clause. The contraceptive coverage law is neutral and generally applicable to all employers, and it does not target religion. Nothing about the regulatory scheme violates the Establishment Clause either. The fact that the Archdiocese, a church, is completely exempt, while the educational and charitable organizations must seek relief through the accommodation does not constitute unlawful discrimination among denominations, and it does not entangle the government in religious affairs.

With one important exception, the law also passes muster under the Free Speech Clause of the First Amendment. The fact that counseling is included within the set of services to be offered, and the

requirement that a religious organization certify its objection to providing contraceptive services to be eligible for the accommodation do not violate the Constitution. But defendants cannot lawfully prohibit a self-insured religious organization from seeking to influence – directly or indirectly – a third-party administrator's decision on whether to remain in a contractual relationship with a plan. That is a content-based restriction on expression that is not justified by the government's proffered interest.

Finally, the Court finds that defendants did not violate the Administrative Procedure Act, that the accommodation and the exemption do not lead to unlawful interference with internal church governance, and that there is no plaintiff that can allege an injury arising out of the challenged interpretation of how the accommodation is to be applied.

BACKGROUND

I. Statutory and Regulatory Background

A. The Affordable Care Act

In March 2010, Congress enacted the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), and the Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010), which together make up the Affordable Care Act ("ACA"). 78 Fed. Reg. 39870-01, 39870 (July 2, 2013). The ACA made changes to the existing Public Health Service Act and incorporated those changes into the Employee Retirement Income Security Act ("ERISA") and the Internal Revenue Code. *Id.*

Two changes made by the ACA are pertinent to this case. The first change is the requirement that employers with more than fifty full-time employees must provide their employees with a health insurance plan that complies with the ACA's minimum essential coverage requirements. 26 U.S.C. § 4980H (2012); *see also* 42 U.S.C. § 300gg-13 (2012). Failure to comply with this provision – often referred to as the "employer mandate" – results in substantial penalties. *See* 26 U.S.C. § 4980H.

The second pertinent change relates to the "essential minimum coverage" that must be offered by an employer's plan. The ACA provides that all insurance plans must cover "preventive care," and specifically, that they "shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for . . . (1) evidence-based items or services that have in effect a rating of 'A' or 'B' in the current recommendations of the United States Preventive Services Task Force," and "(4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration," an agency within the U.S. Department of Health and Human Services ("HHS"). 42 U.S.C. § 300gg-13(a)(1), (4).

B. The Contraceptive Mandate

Pursuant to its delegated authority under ACA section 300gg-13(a)(4), HHS requested that the Institute of Medicine ("IOM") – an organization established by the National Academy of Sciences and funded by Congress – provide recommendations to HHS regarding "what preventive services are

necessary for women's health and well-being and should be considered in the development of comprehensive guidelines for preventive services of women." Inst. of Med., Clinical Preventive Services for Women: Closing the Gaps ("IOM Report") iv, 2, AR 289, 300. After convening a sixteen-member committee, IOM proposed numerous recommendations regarding what preventive services should be covered and how HHS could continue to keep the list up-to-date. *See generally id.* The recommendation most relevant to this case was IOM's suggestion that the definition of "preventive health services" include "the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity" (collectively, "contraceptive services"), which includes diaphragms, oral contraceptive pills, emergency contraceptives, and intrauterine devices. *Id.* at 10, 105, AR 308, 403. After reviewing IOM's recommendations, defendants ultimately adopted the suggestion that the preventive services for which coverage would be required be defined to include all Food and Drug and Administration ("FDA") approved contraceptive services. 78 Fed. Reg. at 39870. That regulation is commonly referred to as "the contraceptive mandate."

In promulgating the initial contraceptive mandate, defendants recognized the potential religious implications and authorized the creation of a religious employer exemption to the contraceptive mandate's requirements. 45 C.F.R. § 147.131(a) (2013); *see also* 78 Fed. Reg. at 39871, 39896. An organization that satisfies the definition of a religious employer derived from the Internal Revenue Code is

wholly exempt from the requirement to cover contraceptive services.[2] 45 C.F.R. § 147.131(a); 78 Fed. Reg. at 39871, 39896. All other employers, including religious organizations that did not meet the definition of a religious employer, were required to comply with the requirements of the contraceptive mandate if they provided a health insurance plan to their employees, regardless of whether they provided the plan voluntarily or because they were subject to the employer mandate.

Religious organizations that did not qualify for the exemption voiced their strong objection to the coverage requirements. In response to their concerns, HHS, the Department of Labor, and the Department of the Treasury (collectively, "the Departments") "issued guidance establishing a temporary safe harbor from enforcement of the contraceptive coverage requirement by the Departments for group health plans established or maintained by certain nonprofit organizations with religious objections to

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[2] The religious employer exemption originally defined "religious employer" as one that:

(1) has the inculcation of religious values as its purpose;

(2) primarily employs persons who share its religious tenets;

(3) primarily serves persons who share its religious tenets; and

(4) is a nonprofit organization described in section 6033(a)(1) and (a)(3)(A)(i) or (iii) of the [Internal Revenue] Code.

78 Fed. Reg. at 39871. The definition has since been altered to state that "a 'religious employer' is an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended." 45 C.F.R. § 147.131(a); *see also* 78 Fed. Reg. at 39896.

contraceptive coverage." 78 Fed. Reg. at 39871. During that safe harbor, the Departments published an advance notice of proposed rulemaking that solicited comments on how to achieve the goal of ensuring "more women broad access to recommended preventive services, including contraceptive services, without cost sharing, while simultaneously protecting certain additional nonprofit religious organizations with religious objections to contraceptive coverage." *Id.* At the end of the comment period, the Departments published proposed regulations at 78 Fed. Reg. 8456 that created what has come to be known as "the accommodation." 78 Fed. Reg. 8456, 8462 (Feb. 6, 2013); *see also* 29 C.F.R. § 2590.715–2713A (2013). On July 2, 2013, the Departments adopted the final version of that accommodation, which is available to all "eligible organizations." *See* 78 Fed. Reg. at 39870-01, 39874; *see also* 29 C.F.R. § 2590.715–2713A.

An organization is considered an "eligible organization" for purposes of the accommodation if it satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (a)(1)

> through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (b) or (c) of this section applies.

29 C.F.R. § 2590.715-2713A(a)(1)–(4).

The accommodation then specifies two sets of means by which the employees of an eligible organization will obtain coverage for contraceptive services based upon whether the organization offers health insurance to its employees through a self-insured health plan or a group insured health plan. *See id.* § 2590.715–2713A(b)–(c).

In the group insured context, an eligible organization satisfies its obligations under the contraceptive mandate by providing its insurance issuer ("insurer") with a self-certification form. *Id.* § 2590.715–2713A(c)(1). At that point, the statutory duty to provide the organization's employees with cost-free contraceptive services coverage automatically shifts to the insurer. *Id.* § 2590.715–2713A(c)(2); *see also* 78 Fed. Reg. at 39876. The insurer cannot decline to provide that coverage on the self-certifying organization's behalf, and the insurer must expressly exclude contraceptive services coverage from the self-certifying organization's plan. 29 C.F.R. § 2590.715–2713A(c)(2)(i); *see also* 78 Fed. Reg. at 39876. Furthermore, the insurer is expressly prohibited from passing on the costs of covering contraceptive services to either the self-certifying organization or that organization's employees. 29 C.F.R. § 2590.715–2713A(c)(2)(ii); *see also* 78 Fed. Reg. at 39876.

If an eligible organization is self-insured, the organization that objects to providing contraceptive coverage on religious grounds must provide its "third party administrator that will process claims for any contraceptive services required to be covered . . . with a copy of the self-certification described in paragraph (a)(4) of this section." 29 C.F.R. § 2590.715–2713A(b)(1)(ii). If the third-party administrator agrees to remain in its contractual relationship with the organization or its plan, the self-certifying organization has met its obligation under the contraceptive mandate. *Id.* § 2590.715–2713A(b)(1); *see also* 78 Fed. Reg. at 39879. It is the third-party administrator that must then provide or arrange payments for contraceptive services without "imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization." 29 C.F.R. § 2590.715–2713A(b)(2)(i)–(ii).[3]

The third-party administrator becomes a "plan administrator" under ERISA for purposes of providing the contraceptive coverage, *see id.* § 2510.3–16(b), and it provides the coverage through the eligible organization's self-insured plan. *See id.* § 2590.715–2713A(b).

But a third-party administrator is permitted to decline to assume responsibility for providing contraceptive services coverage on behalf of a self-certifying organization by cancelling its contract with the eligible organization and declining to serve as

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[3] The "costs of providing or arranging such payments . . . may be reimbursed through an adjustment to the Federally-facilitated Exchange user fee." 29 C.F.R. § 2590.715-2713A(b)(4).

that organization's third-party administrator. *Id.* § 2590.715–2713A(b)(2); *see also* 78 Fed. Reg. at 39879.[4] If the contract is cancelled, the self-certifying organization must either provide the self-certification form to its newly hired third-party administrator, *see* 29 C.F.R. § 2590.715–2713A(b), or notify the government that it will no longer use a third-party administrator and await further instruction on how it may comply with the contraceptive mandate's requirements. 78 Fed. Reg. at 39880–81.[5]

Regardless of whether a self-certifying organization utilizes an insurer or a third-party administrator, the accommodation requires that notice of the availability of separate payments for contraceptive services be provided to plan participants and beneficiaries contemporaneous with, "but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in [the organization's] group health coverage." 29 C.F.R. § 2590.715-2713A(d). The accommodation relieves a self-certifying religious

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[4] While the preamble to the regulations expresses defendants' intention to implement the regulations on an employer-by-employer, and not a plan-by-plan basis, the regulations themselves do not clearly address how this will operate in practice in the situation where an employer offers its employees coverage under the auspices of a self-insured plan established by another entity that has identified and entered into a contract with the third-party administrator.

[5] At this time, defendants have not specified the procedures that will govern a self-insured eligible organization that does not use a third-party administrator because defendants have not received any information to indicate that any such organization exists. *See* 78 Fed. Reg. at 39880–81.

organization of any responsibility to provide or pay for contraceptive services coverage itself.

II. Procedural and Factual Background

Plaintiffs in this case consist of the Archdiocese, several charitable organizations that are affiliated with the Catholic Church – Catholic Academies, Archbishop Carroll, Don Bosco, Mary of Nazareth, Catholic Charities, Victory Housing, and the Catholic Information Center – and two Catholic institutions of higher education: Catholic University of America and Thomas Aquinas College. Compl. ¶¶ 2, 16–25, 59, 66, 74, 83, 90, 98, 107. They challenge the contraceptive mandate under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, several provisions of the First Amendment to the U.S. Constitution, and the Administrative Procedure Act, 5 U.S.C. § 501 *et seq.*, and they argue that the accommodation does not remedy those violations. Compl. ¶¶ 237–339. Pending before this Court are defendants' motion to dismiss, or in the alternative, for summary judgment and plaintiffs' cross-motion for summary judgment. For purposes of deciding this case, the Court will adopt the following undisputed material facts.

The Archdiocese employs approximately 1,825 full-time employees, Supplemental Aff. of the Archdiocese ("Supp. Aff. Archdiocese"), Ex. A to Pls.' Reply ¶ 4 [Dkt. # 33-1], and operates a self-insured health plan that is "recognized under the Employee Retirement Income Security Act as a 'church plan.'" Pls.' Statement of Material Facts ("Pls.' SOF"), Ex. 2 to Pls.' Opp. & Cross-Mot. ¶ 2 [Dkt. # 27-2]. The plan is currently administered by a third-party administrator, National Capital Administrative

Services, Inc. *Id.* Although separately incorporated, Catholic Academies, Archbishop Carroll, Don Bosco, Mary of Nazareth, Catholic Charities, Victory Housing, and the Catholic Information Center are affiliated with the Archdiocese, and they offer their employees health insurance coverage through the Archdiocese's self-insured health plan. *Id.* ¶ 5.

Catholic Academies, Archbishop Carroll, Mary of Nazareth, Catholic Charities, and Victory Housing all employ over fifty full-time employees. Supplemental Aff. of CCA ("Supp. Aff. CCA"), Ex. B to Pls.' Reply ¶ 4 [Dkt. # 33-2]; Supplemental Aff. of ACHS ("Supp. Aff. ACHS"), Ex. C to Pls.' Reply ¶ 4 [Dkt. # 33-3]; Supplemental Aff. of Mary of Nazareth ("Supp. Aff. Mary of Nazareth"), Ex. E to Pls.' Reply ¶ 4 [Dkt. # 33-5]; Supplemental Aff. of Catholic Charities ("Supp. Aff. Catholic Charities"), Ex. F to Pls.' Reply ¶ 4 [Dkt. # 33-6]; Supplemental Aff. of Victory Housing ("Supp. Aff. Victory Housing"), Ex. G to Pls.' Reply ¶ 4 [Dkt. # 33-7]. Don Bosco and the Catholic Information Center employ less than fifty full-time employees. Supplemental Aff. of Don Bosco ("Supp. Aff. Don Bosco"), Ex. D to Pls.' Reply ¶ 4 [Dkt. # 334]; Supplemental Aff. of the CIC ("Supp. Aff. CIC"), Ex. H to Pls.' Reply ¶ 4 [Dkt. # 33-8].

The remaining two plaintiffs – Catholic University and Thomas Aquinas – also employ over fifty full-time employees. Supplemental Aff. of CUA ("Supp. Aff. CUA"), Ex. I to Pls.' Reply ¶ 5 [Dkt. # 33-9]; Supplemental Aff. of TAC ("Supp. Aff. TAC"), Ex. J to Pls.' Reply ¶ 5 [Dkt. # 33-10]. Catholic University participates in a group insured plan by offering its students a health insurance plan through AETNA and its employees a health insurance plan through

United Healthcare. Pls.' SOF ¶¶ 29, 31. Thomas Aquinas is self-insured; it offers its employees a health insurance plan through the RETA trust, a self-insurance trust set up by the Catholic bishops of California, and the trust is administered by a third-party administrator, Benefit Allocation Systems. *Id.* ¶ 36. The College's self-insured plan is not a church plan under ERISA. Supp. Aff. TAC ¶ 6.

None of the plaintiffs' health insurance plans qualify for the grandfathered plan exception to the ACA. Pls.' SOF ¶¶ 3, 33, 38. The Archdiocese has identified itself to be covered by the religious employer exemption, Aff. of Archdiocese, Ex. A to Pls.' Mot. ¶ 18 [Dkt. # 6-2], but the remaining plaintiffs have stated that they do not qualify for that exemption. Pls.' SOF ¶¶ 9, 12, 15, 18, 21, 24, 27, 34, 39. They are, however, eligible for the accommodation to the contraceptive mandate. Compl. ¶ 10.

"Plaintiffs are all religious entities that are part of, and/or adhere to the teachings and philosophies of, the Roman Catholic Church." Pls.' SOF ¶ 40. Consequently, they all subscribe to the Roman Catholic belief that it is immoral to engage in conduct that artificially interferes with conception or terminates an existing pregnancy, which includes, but is not limited to, abortion, sterilization, emergency contraception, and other contraceptive products. *Id.* ¶¶ 41, 45– 46. It is a tenet of plaintiffs' faith that they not only refrain from using contraception themselves, but that they may not morally assist another in accessing those services. *Id.* ¶ 48. As a result, plaintiffs have "historically excluded coverage for abortion, contraceptives (except

when used for non-contraceptive purposes), sterilization, and related education and counseling" from their health insurance plans, *id.* ¶ 6; *see also* Aff. of CUA, Ex. I to Pls.' Mot. ¶ 15 [Dkt. # 6-10]; Aff. of TAC, Ex. J to Pls.' Mot. ¶ 13 [Dkt. # 6-11], and they contend that compliance with the contraceptive mandate, even as it has been modified, would violate their religious belief.

STANDARD OF REVIEW

I. Federal Rule of Civil Procedure 12(b)(1)

Under Rule 12(b)(1), the plaintiff bears the burden of establishing jurisdiction by a preponderance of the evidence. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Shekoyan v. Sibley Int'l Corp.*, 217 F. Supp. 2d 59, 63 (D.D.C. 2002). Federal courts are courts of limited jurisdiction and the law presumes that "a cause lies outside this limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *see also Gen. Motors Corp. v. EPA*, 363 F.3d 442, 448 (D.C. Cir. 2004) ("As a court of limited jurisdiction, we begin, and end, with an examination of our jurisdiction."). "[B]ecause subject-matter jurisdiction is 'an Art[icle] III as well as a statutory requirement . . . no action of the parties can confer subject-matter jurisdiction upon a federal court.'" *Akinseye v. District of Columbia*, 339 F.3d 970, 971 (D.C. Cir. 2003), quoting *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

"To state a case or controversy under Article III, a plaintiff must establish standing." *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1442 (2011); *see also Lujan*, 504 U.S. at 560. Standing is a necessary predicate to any exercise of federal

jurisdiction, and if it is lacking, then the dispute is not a proper case or controversy under Article III, and federal courts have no subject-matter jurisdiction to decide the case. *Dominguez v. UAL Corp.*, 666 F.3d 1359, 1361 (D.C. Cir. 2012). To establish constitutional standing, a plaintiff must demonstrate: (1) that he has suffered an "injury in fact"; (2) that the injury is "fairly traceable" to the challenged action of the defendant; and (3) that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560–61 (internal quotation marks omitted); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167 (2000). Failure to demonstrate even one of the three requirements will defeat subject-matter jurisdiction. *See Lujan*, 504 U.S. at 561.

When considering a motion to dismiss for lack of jurisdiction for standing, unlike when deciding a motion to dismiss under Rule 12(b)(6), the court "is not limited to the allegations of the complaint." *Hohri v. United States*, 782 F.2d 227, 241 (D.C. Cir. 1986), *vacated on other grounds*, 482 U.S. 64 (1987). Rather, "a court may consider such materials outside the pleadings as it deems appropriate to resolve the question [of] whether it has jurisdiction to hear the case." *Scolaro v. D.C. Bd. of Elections & Ethics*, 104 F. Supp. 2d 18, 22 (D.D.C. 2000), citing *Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 197 (D.C. Cir. 1992); *see also Jerome Stevens Pharm., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005).

II. Federal Rule of Civil Procedure 56

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any

material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The party seeking summary judgment bears the "initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (internal quotation marks omitted).

To defeat summary judgment, the nonmoving party must "designate specific facts showing that there is a genuine issue for trial." *Id.* at 324 (internal quotation marks omitted). The existence of a nongenuine, nonmaterial factual dispute is insufficient to preclude summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). A dispute is "genuine" only if a reasonable fact-finder could find for the nonmoving party, and a fact is only "material" if it is capable of affecting the outcome of the litigation. *Id.* at 248; *see also Laningham v. U.S. Navy*, 813 F.2d 1236, 1241 (D.C. Cir. 1987). In assessing a party's motion, the court must "view the facts and draw reasonable inferences 'in the light most favorable to the party opposing the summary judgment motion.'" *Scott v. Harris*, 550 U.S. 372, 378 (2007) (alterations omitted), quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam).

ANALYSIS

I. Plaintiffs' Religious Freedom Restoration Act claims.

The central claim in this case is Count I: plaintiffs' claim that the contraceptive mandate violates the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq*., because it "requires Plaintiffs to provide, pay for, and/or facilitate access to abortion-inducing products, contraception, sterilization procedures, and related counseling, in a manner that is directly contrary to their religious beliefs." Compl. ¶ 241. It is undisputed that the Church itself – the Archdiocese – is completely exempt from the requirement, and therefore, it is not joined in Count I. It is also part of the background of this case that defendants delayed implementation of the mandate for a year and engaged in a rulemaking process in an effort to address the objections raised by other religious organizations and to alleviate the burden that they identified. Thus, the question presented in this case is whether the accommodation promulgated in July 2013 achieves that aim or whether the mandate, as it has now been modified, imposes a substantial burden on plaintiffs' free exercise of religion.

RFRA provides that the government shall not "substantially burden a person's exercise of religion" unless it can demonstrate that application of the burden to the person: "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling

governmental interest." 42 U.S.C. § 2000bb-1(a)–(b).[6] The prohibition applies even if the burden results from a rule of general applicability. *Id.* § 2000bb-1(a). To successfully mount a RFRA challenge and subject government action to strict scrutiny, a plaintiff must meet the initial burden of establishing that the government has substantially burdened his religious exercise. *Henderson v. Stanton*, 76 F. Supp. 2d 10, 14 (D.D.C. 1999). Only if that predicate has been established will the onus then shift to the government to show that the law or regulation is the least restrictive means to further a compelling interest. 42 U.S.C. §§ 2000bb-1(b), 2000bb-2(3).

Plaintiffs have averred that it is a central tenet of their faith that life begins at the moment of conception, and that their religion therefore requires that "they may not provide, pay for, and/or facilitate access to" contraceptive services. Pls.' Mot. at 19; *see also* Pls.' SOF ¶¶ 42–43; Aff. of CCA, Ex. B to Pls.' Mot. ¶¶ 7–8 [Dkt. # 6-3]; Aff. of ACHS, Ex. C to Pls.' Mot. ¶¶ 7–8 [Dkt. # 6-4]; Aff. of Don Bosco, Ex. D to Pls.' Mot. ¶¶ 7–8 [Dkt. # 6-5]; Aff. of Mary of Nazareth, Ex. E to Pls.' Mot. ¶¶ 7–8 [Dkt. # 6-6]; Aff. of Catholic Charities, Ex. F to Pls.' Mot. ¶¶ 7–8 [Dkt. # 6-7]; Aff. of Victory Housing, Ex. G to Pls.' Mot. ¶¶ 7–8 [Dkt. # 6-8]; Aff. of CIC, Ex. H to Pls.' Mot. ¶¶ 7–8 [Dkt. # 6-9]; Aff. of CUA ¶¶ 13–14; Aff. of TAC ¶¶ 11–12. The government does not contest the

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[6] Although the Supreme Court found RFRA unconstitutional as applied to the states, *City of Boerne v. Flores*, 521 U.S. 507, 533–34 (1997), the statute still applies to the federal government, *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 166 (D.C. Cir. 2003); *Henderson v. Kennedy*, 265 F.3d 1072, 1073 (D.C. Cir. 2001).

sincerity of these beliefs. *See* Defs.' Combined Mem. in Opp. to Pls.' Cross-Mot. for Summ. J. & Reply in Supp. of Defs.' Mot. to Dismiss, or in the alt., for Summ. J. ("Defs.' Opp. & Reply") at 4, 7–20 [Dkt. # 31]; *see also* Defs.' Resp. to Pls.' SOF ¶ 43 [Dkt. # 31-1]. The Court finds that plaintiffs' religion forbids them from facilitating access to contraceptive services, and that finding of fact serves as the basis for the RFRA analysis.

Plaintiffs contend that the contraceptive mandate imposes a burden on their sincere religious belief because it requires that plaintiffs provide a health insurance plan that includes coverage for contraceptive services and counseling and thereby renders them unable to offer a health insurance plan consistent with their religious beliefs. Pls.' Mot. at 21–24. They argue that the accommodation does not alleviate that burden because, as they put it, they must file a self-certification form that "inexorably leads to provision of the very coverage to which they object," and offer a health insurance plan through which their "employees would receive access to the mandated payments [for contraceptive services] *only* by virtue of their participation in [that] health plan." *Id.* at 20. Also, they complain that, in some circumstances, they must "locate and identify a third party willing to provide the very services they deem objectionable, and . . . enter into a contract with that party that will result in the provision or procurement of those services 'for free.'" *Id.* All of these burdens, plaintiffs state, are substantial, because failure to comply with the requirement of the contraceptive mandate – either by providing the coverage or by self-certifying under the accommodation – results in

significant monetary penalties. *Id.* at 22–24; *see also* 26 U.S.C. § 4980H.

Defendants maintain that the accommodation has eliminated the objectionable impact of the mandate and that any remaining burden on plaintiffs' religious exercise is at most de minimis or too attenuated to be substantial and to trigger strict scrutiny under RFRA. Defs.' Mem. at 11– 20. They also argue that all the plaintiffs except Catholic University and Thomas Aquinas lack standing to bring a RFRA challenge. Defs.' Opp. & Reply at 5–7. But if the Court determines that any one plaintiff is substantially burdened by the contraceptive mandate and that it must therefore go on to apply strict scrutiny to the regulatory scheme, defendants concede that the D.C. Circuit's recent holding that the contraceptive mandate does not satisfy strict scrutiny controls this case and is binding on this Court.[7] *See Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1219–24 (D.C. Cir. 2013); Defs.' Opp. & Reply at 17; Mot. Hr'g Tr. 34. As a result, the RFRA analysis here is limited to the question of whether the contraceptive mandate places a substantial burden on plaintiffs' asserted religious exercise.

Congress enacted RFRA in response to the decision in *Employment Division, Department of Human Services of Oregon v. Smith*, 494 U.S. 872 (1990), in which the Supreme Court narrowed what had been its previous delineation of the scope of the protection

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[7] Defendants did, however, note objection to the Circuit's decision in *Gilardi*, thereby preserving the issue for appeal. *See* Defs.' Opp. & Reply at 17; Mot. Hr'g Tr. 34.

afforded to religion by the Free Exercise Clause. *See* Holy Land Found., 333 F.3d at 166. In *Smith*, the Court permitted a law that was neutral towards religion to stand, notwithstanding its impact on a particular plaintiff's religious exercise. 494 U.S. at 890. Thereafter, as Congress expressly stated in the findings and declaration of purpose section of the statute, RFRA was enacted "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1); *see also Holy Land Found.*, 333 F.3d at 166–67. Thus, if the question to resolve is whether plaintiffs have met their burden to establish that the challenged regulations impose a substantial burden on their religious exercise, *Sherbert* and *Yoder* must be the starting point of the analysis. *See Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 120 (D.D.C. 2012) ("Accordingly, courts look to pre-*Smith* free exercise jurisprudence in assessing RFRA claims."); *see also Vill. of Bensenville v. FAA*, 457 F.3d 52, 62 (D.C. Cir. 2006).

In *Sherbert*, a member of the Seventh-Day Adventist Church was fired by her employer for her refusal to work on Saturday, the day on which she observed the Sabbath. 374 U.S. at 399. She was subsequently found to be ineligible for state unemployment benefits on the grounds that she had failed, without good cause, to accept employment that had been offered. *Id.* at 400–01. To resolve her constitutional challenge to the state's decision, the Supreme Court first addressed the question of whether the disqualification imposed a burden on the

employee's free exercise of her religion. *Id.* at 403. The Court likened the situation to a fine imposed on the employee for her Saturday worship and stated:

> [I]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.

Id. at 404 (citations omitted).

Yoder involved members of the Old Order Amish religion and a member of the Conservative Amish Mennonite Church who declined to send their children to public school after eighth grade and were convicted of violating the state's compulsory attendance laws. 406 U.S. at 207–08. In that case, the Court observed that:

> [T]he unchallenged testimony of acknowledged experts in education and religious history, almost 300 years of consistent practice, and strong evidence of a sustained faith pervading and regulating respondents' entire mode of life support the claim that enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely

> endanger if not destroy the free exercise of respondents' religious beliefs.

Id. at 219. The state did not challenge those findings, but it advanced the position that the state's interest in universal compulsory education was so great that the laws should be enforced notwithstanding the undisputed religious consequences. *Id.* Thus, the bulk of the opinion is only relevant to the second prong of the RFRA analysis, but the Court did state, in language that appears in plaintiffs' pleadings: "The impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Id.* at 218.

The Supreme Court took up the denial of unemployment benefits again in *Thomas*. 450 U.S. at 707. Thomas terminated his employment at a foundry and machinery company when he was transferred from a department that fabricated steel for a range of industrial uses to a department that produced turrets for military tanks. *Id.* at 710. At that time, there were no longer any units at the company that were not involved in the manufacture of armaments, and Thomas, a Jehovah's Witness, maintained that participation in the production of weapons for war violated his religious beliefs. *Id.* at 710–11. When the employer declined to lay him off, he quit and was subsequently denied unemployment benefits by the state on the grounds that his departure was not based on good cause. *Id.* at 710–12.

As in *Sherbert*, the state argued that its public welfare legislation did not directly command the employee to violate his conscience, but the Court noted that "the employee was put to a choice between fidelity to religious belief or cessation of work" and therefore "the coercive impact on Thomas is indistinguishable from *Sherbert*." *Id.* at 717. The Court then restated the principle that had been set out in *Sherbert*:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Id. at 717–18.

In sum, all of the key Supreme Court cases involve individuals who were compelled, under the threat of either punishment or the denial of a benefit, to act: to personally do the very thing that violated their religious beliefs. That means that the issue in this case is whether plaintiffs are being required to "modify their behavior" or perform acts that contravene the tenets of their faith.

Plaintiffs laid out their position in their motion for preliminary injunction:

> Under the original version of the Mandate, a non-exempt religious organization's decision to offer a group health plan resulted in the provision of coverage for [contraceptive services].

> Under the Final Rule, a non-exempt religious organization's decision to offer a group health plan *still* results in the provision of coverage . . . . In both scenarios, Plaintiffs' actions trigger the provision of "free" contraceptive coverage to their employees in a manner contrary to their beliefs. The provision of the objectionable products and services are directly tied to Plaintiffs' insurance policies . . . .

Pls.' Mot. at 10. But plaintiffs have not cited the Court to any binding Supreme Court or Circuit precedent that would call for the invalidation of a law based upon its consequences, that is, when plaintiffs are not being required to pay for or "provide" the services themselves, but rather, the result of compliance with the regulatory steps would be "*the provision of*" the objectionable services by a third party to another third party.

Indeed, the precedent in this Circuit points to the opposite conclusion.

In *Kaemmerling v. Lappin*, the D.C. Circuit explained that a plaintiff cannot satisfy his burden under RFRA if the government regulation requires a third party, and not the plaintiff, to act in a way that violates the plaintiff's religious beliefs. 553 F.3d 669, 679 (D.C. Cir. 2008). In that case, the plaintiff challenged the DNA Act, which directs the Federal Bureau of Prisons ("BOP") to collect tissue or fluid samples from individuals in custody who have been convicted of certain offenses. *Id.* at 673. The BOP then delivers the samples to the FBI for the extraction and analysis of the DNA they contain and the creation of a unique profile for each offender, which is stored in an FBI database. *Id.* Kaemmerling,

an Evangelical Christian, moved to enjoin the application of the Act to him because he objected to the distillation and retention of his DNA – "a foundational aspect . . . of God's creative work" – on religious grounds. *Id.* at 674, 678. The court emphasized that the plaintiff did not object to the government's collection of any of the bodily specimens that contained his DNA – not to the gathering of his hair or skin particles or even the drawing of his blood; rather, plaintiff was only opposed to the government's extraction of the DNA from the sample once it was obtained. *Id.* at 679. Under those circumstances, the court found that the complaint failed to allege a substantial burden that would be cognizable under RFRA:

> Kaemmerling's objection to the DNA Act centers on the government's act of extracting and analyzing his DNA . . . without suggesting that the Act imposes any restriction on what Kaemmerling can believe or do. Like the parents in *Bowen*, Kaemmerling's opposition to government collection and storage of his DNA profile does not contend that any act of the government pressures him to change his behavior and violate his religion, but only seeks to require the government to conduct its affairs in conformance with his religion.

Id. at 680; *see also Bowen v. Roy*, 476 U.S. 693, 699–700 (1986) (explaining that free exercise of religion does not require "the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family").

The D.C. Circuit emphasized this principle at several points in the *Kaemmerling* opinion:

> The government's extraction . . . of Kaemmerling's DNA information does not call for Kaemmerling to modify his religious behavior in any way – *it involves no action or forbearance on his part*, nor does it otherwise interfere with any religious act in which he engages. Although the government's activities with his fluid or tissue sample after the BOP takes it may offend Kaemmerling's religious beliefs, they cannot be said to hamper his religious exercise because they do not "pressure [*him*] to modify his behavior and to violate his beliefs."

Id. at 679 (second alteration in original) (emphases added), quoting *Thomas*, 450 U.S. at 718. And the court made it clear that its application of RFRA derived directly from the Supreme Court precedent that Congress had incorporated into the statute:

> Religious exercise necessarily involves an action or practice, as in *Sherbert*, where the denial of unemployment benefits impeded the observance of the plaintiff's religion by pressuring her to work on Saturday . . . , or in *Yoder*, where the compulsory education law compelled the Amish to perform acts undeniably at odds with fundamental tenets of their religious beliefs. *Kaemmerling*, in contrast . . . suggests no way in which these governmental acts pressure him to modify his own behavior in any way that would violate his beliefs.

Id. at 679 (alteration, citations, and internal quotation marks omitted).[8]

It is against this legal backdrop that the Court must analyze plaintiffs' RFRA claim. Have defendants put pressure on plaintiffs to modify their behavior and violate their beliefs? Or does the accommodation alleviate the pressure on them as it was intended to do? Plaintiffs cannot rest their claims on the fact that their employees will still receive access to contraceptives under the accommodation; they must point to conduct that they

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[8] The D.C. Circuit has also found a burden to be inconsequential or de minimis on other grounds, such as where the government regulation merely prohibits one of a multitude of methods of exercising religion. *Mahoney v. Doe*, 642 F.3d 1112 (D.C. Cir. 2011); *Henderson v. Kennedy*, 253 F.3d 12 (D.C. Cir. 2001); *see also Mead v. Holder*, 766 F. Supp. 2d 16 (D.C. Cir. 2011). In *Henderson* and *Mahoney*, the plaintiffs challenged regulations that prevented individuals from selling t-shirts on the National Mall and regulations that prohibited "chalking" the sidewalk in front of the White House, respectively. 642 F.3d at 1115; 253 F.3d at 13–14. Both sets of plaintiffs argued that these regulations – otherwise neutral to religion – violated RFRA because they prevented plaintiffs from following the religious requirement that they spread the gospel. *Mahoney*, 642 F.3d at 1120; *Henderson*, 253 F.3d at 15. The D.C. Circuit ruled that neither regulation imposed a substantial burden because the regulations were, at most, "a restriction on one of a multitude of means" by which plaintiffs could exercise their religion and other alternative means were still available. *Henderson*, 253 F.3d at 17; *see also Mahoney*, 642 F.3d at 1121. But the court also specifically noted that neither case posed a situation where "the regulation force[d the plaintiffs] to engage in conduct that their religion forbid" or prevented "them from engaging in conduct their religion require[d]." *Henderson*, 253 F.3d at 16; *see also Mahoney*, 642 F.3d at 1121.

are obliged to undertake that, in and of itself, violates their religious beliefs.

The Court acknowledges and respects the sincerity of plaintiffs' expression of their religious beliefs, and it emphasizes that its ruling is not predicated in any way upon a failure to accept plaintiffs' articulation of what their faith commands. The Court has no intention of substituting its judgment for that of the affiants on the existence or nature or importance of this aspect of their religion, and nothing in this opinion should be read as an indication of any divergence of opinion on those topics. *See Gilardi*, 733 F.3d at 1216 ("We begin with the peculiar step of explaining what is *not* at issue. This case is not about the sincerity of the [plaintiffs]' religious beliefs, nor does it concern the theology behind Catholic precepts on contraception. The former is unchallenged, while the latter is unchallengeable.").

The Court also recognizes that it is not within its province to assess the centrality of the particular religious tenet involved to plaintiffs' faith or to calibrate where the challenged conduct might fall on a spectrum of objectionable practices: whether it would offend plaintiffs' religious sensibilities or "gravely endanger if not destroy" the exercise of their religious beliefs as in *Yoder*. *See Kaemmerling*, 553 F.3d at 678 ("Because the burdened practice need not be compelled by the adherent's religion to merit statutory protection, we focus not on the centrality of the particular activity to the adherent's religion but rather on whether the adherent's sincere religious exercise is substantially burdened.").

In sum, the Court is not qualified or authorized to state what Catholicism does or does not prohibit, and

it accepts plaintiffs' expressions of their principles on its face. At the same time, there is nothing about RFRA or First Amendment jurisprudence that requires the Court to accept plaintiffs' characterization of the regulatory scheme on its face. Put differently, although the Court is bound to accept the statements in plaintiffs' affidavits that their religious teachings go beyond a ban on the personal use of contraceptives and that "facilitating access" to contraceptive services and products is also inconsistent with Catholicism, the Court may determine whether compliance with the contraceptive mandate and accommodation actually constitutes compelled "facilitation." Interpreting a regulatory scheme is a secular task that is well within the Court's domain. The D.C. Circuit specifically recognized this point in *Kaemmerling*, when it noted that there is a critical distinction between a plaintiff's unassailable factual recitation of what his religion entails and the court's ultimate finding on whether his religious exercise has been substantially burdened: "Accepting as true the factual allegations that Kaemmerling's beliefs are sincere and of a religious nature – but not the legal conclusion, cast as a factual allegation, that his religious exercise is substantially burdened – we conclude that *Kaemmerling* does not allege facts sufficient to state a substantial burden . . . ." 553 F.3d at 679.

Plaintiffs' pleadings contain many legal conclusions advanced as facts, and therefore, to resolve the RFRA claims, it is necessary to hone in more closely on the details of the regulations themselves rather than the parties' characterizations of them. Because those regulations affect different plaintiffs differently based upon the type of insurance

plan they offer, it is also necessary to take up certain plaintiffs' claims separately. Catholic University covers its employees under a group health plan, which falls under section 2590.715–2713A(c), and Catholic Academies, Archbishop Carroll, Don Bosco, Mary of Nazareth, Catholic Charities, Victory Housing, Catholic Information Center, and Thomas Aquinas cover their employees through self-insured plans, which are addressed in section 2590.715–2713A(b). Seven of those plaintiffs offer insurance through the exempt Archdiocese's self-insured health plan, and only one plaintiff, Thomas Aquinas, offers its employees a health plan through a self-insured entity that is not exempt from the mandate itself. The different situations produce different outcomes.

A. The contraceptive mandate does not impose a substantial burden on Catholic University of America's religious exercise.

Of the ten plaintiffs in this case, Catholic University is the only plaintiff that offers its students and employees the option to participate in a group health plan through insurers, specifically AETNA and United Healthcare. Pls.' SOF ¶¶ 29–32. The regulations contain a specific set of rules that deal with organizations insured under a group plan, and in light of the accommodation available in that instance, the contraceptive mandate as modified does not impose a substantial burden on the University's religious belief. *See Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 13-1261 (D.D.C. Dec. 19, 2013).

Catholic University has established that its sincerely held religious belief prohibits it from

providing or facilitating access to contraceptive services coverage. Aff. of CUA ¶¶ 14–15. The affidavit of Frank Persico explains that Catholicism "teaches that life begins at the moment of conception, that sexual union should be reserved to committed marital relationships in which the husband and wife are open to the transmission of life, and, therefore, that artificial interference with life and conception are immoral." *Id.* ¶ 13. As a result, "[o]ffering a health insurance policy that provides coverage for or facilitates access to abortion-inducing products, contraceptives, sterilization, and related education and counseling is thus inconsistent with the core moral and religious beliefs of the University." *Id.* ¶ 14. In their joint pleadings, plaintiffs have explained that, although Catholicism does not require them to prevent their employees or students from gaining access to contraceptive services coverage, it does require that they not participate in the provision of that coverage. *See* Pls.' Reply in Supp. of its Cross-Mot. for Summ. J. ("Pls.' Reply") at 4 [Dkt. # 33] ("If the Government believes all women must be provided with free abortion-inducing products, sterilization, and contraceptives, Plaintiffs ask only that the Government not force them to participate in that effort."). The Court finds that, since the accommodation effectively severs an organization that offers its employees or students an insured group health plan from participation in the provision of the contraceptive coverage, it relieves Catholic University of any burden cognizable under RFRA. *See Priests for Life*, No. 13-1261.

Under the terms of the new regulations, a religious organization is eligible for the accommodation once it certifies that: it is a nonprofit entity, it holds itself

out as a religious organization, and it opposes providing coverage for some or all of the contraceptive services required to be covered under the mandate. 29 C.F.R. § 2590.715–2713A(a). A group health plan established or maintained by an eligible religious organization complies with the requirement to provide contraceptive coverage "if the eligible organization or group health plan furnishes a copy of the self-certification . . . to each issuer that would otherwise provide such coverage in connection with the group health plan." *Id.* § 2590.715–2713A(c)(1). At that point, "[a] group health insurance issuer that receives a copy of the self-certification . . . with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage . . . must –

> (A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and
>
> (B) Provide separate payments for any contraceptive services required to be covered . . . for plan participants and beneficiaries."

Id. § 2590.715–2713A(c)(2)(i).

What does this mean? Catholic University must identify itself as an organization with religious objections by completing a form that states, as it has repeatedly averred in this litigation, that it objects to the provision of contraceptive services on religious grounds. Then, either the University or its health plan must furnish its insurance issuers – Aetna and United Healthcare – with a copy of the self-

certification. That is the extent of what is required from the religious organization. The insurance issuers are obligated under the ACA to provide contraceptive coverage under section 2590.715–2713A(c)(2), and once they receive the self-certification, they must expressly exclude the contraceptive coverage from the healthcare coverage that is being provided in connection with Catholic University's plan and pay for the coverage themselves.[9] *Id.* So, the health insurance plan that the ACA employer mandate requires the University to provide will *not* cover contraceptive services. The University has stated in its affidavit that offering a health insurance policy that provides coverage for contraceptive services would be inconsistent with its religious beliefs, but it is no longer required to do so. Under the terms of the accommodation, Catholic University's group health plan that does not include contraceptive services coverage will be in full compliance with the ACA once the University self-

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[9] The statement in Catholic University's affidavit that, under the accommodation, the University "bears the burden of locating and identifying an insurance company willing to provide the very services it deems objectionable," Aff. of CUA ¶ 17, is not consistent with the regulations, and therefore, it is not a circumstance that can be found to be a burden on the school's religious exercise. Also, because the accommodation explicitly requires the insurer to engage in separate accounting to ensure that none of Catholic University's premiums are used to pay for contraceptive services, 29 C.F.R. § 2590.715–2713A(c)(2)(ii), the Court is not persuaded by the University's argument that the "cost-neutrality" of providing contraceptive services somehow results in its premiums being used to pay for contraceptive services. *See* Pls.' Mot. at 21 n.15.

certifies that it objects to the provision of that coverage.[10]

Plaintiffs, including Catholic University, maintain that the obligation to self-certify to avail themselves of the accommodation is a burden on religion in and of itself because the act of completing the form "facilitates" or "authorizes" the provision of contraceptive coverage to their students or employees. Pls.' Mot. at 20 ("In other words, the government has effectively made 'no' mean 'yes,' transforming the very act of objecting to the mandated coverage into the authorization to provide such coverage."). But this conclusory characterization of the regulatory scheme is not immune from probing by the Court merely because it has been incorporated into each of the plaintiffs' sworn affidavits. *See, e.g.*, Aff. of CUA ¶ 17 ("[P]erversely, it is CUA's self-certification of its religious objection that authorizes provision of the mandated coverage."). That is not a matter of religious doctrine, and when plaintiffs insist on referring to the self-certification as a "permission slip" in their papers, *see, e.g.*, Pls.' Reply at 3, they make it plain that this aspect of their case turns largely upon semantics and not theology.[11]

For one thing, the "authority" to provide contraceptive services to the women who work or

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[10] For the same reasons, the contraceptive mandate does not place Catholic University in a position where it will give rise to "scandal by acting in a way inconsistent with Church teachings." Aff. of CUA ¶ 19.

[11] Indeed, in *Priests for Life v. U.S. Dep't of Health & Human Services*, the Catholic plaintiffs *conceded* that the self-certification was not a burden of their exercise of religion, in and of itself. No. 13-1261, slip op. at 26–27.

study at the institution is not Catholic University's to bestow. Access to contraceptives is guaranteed by the Constitution. *Griswold v. Connecticut*, 381 U.S. 479 (1965). As plaintiffs acknowledged in their pleadings, they have "no legal right to prevent individuals from procuring the objectionable products and services from the Government or anywhere else." Pls.' Mot. at 20. And cost-free access to contraceptive services – to women who are covered by a health plan anywhere – has already been guaranteed by the ACA and the implementing regulations. 42 U.S.C. § 300gg-13; 29 C.F.R. § 2590.715–2713. In the insured group plan context, the "authority" for the insurers to provide that coverage – or more aptly described, their "obligation" to do so – is imposed by the regulatory scheme, and it exists whether Catholic University takes any steps to ensure compliance with the mandate or not. *See* 29 C.F.R. § 2590.715–2713A(c) (listing the obligation of an insurer of a self-certifying organization to provide contraceptive services coverage in mandatory terms). Through its self-certification, the religious organization declares its intention to step out of the process. That cannot be accurately characterized as an act that "facilitates" the employees' access to the services.[12]

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[12] Catholic University also argues that it is burdened because, under the contraceptive mandate, it "will be forced to further facilitate access to the mandated coverage by . . . identifying its benefits-eligible employees for the insurance company." Aff. of CUA ¶ 17. In other words, the University states that it still must facilitate access to contraceptive services coverage even if those services are completely separated from its plan because it must provide the insurer with the names of those individuals who are eligible for contraceptive services payments. But the University does not point to any regulation that imposes this

Similarly, the University cannot support the legal finding that its religious exercise is burdened with its assertion that contraceptive services "coverage will be made available to CUA's employees only for so long as they remain on the University's plan." Aff. of CUA ¶ 17. The use of the passive voice – "coverage will be made available" – conveys an objection to the consequences of the self-certification, not to the action of certifying itself. Moreover, that factual assertion is belied by the fact that the insurance mandate will follow the school's employees wherever they go, and that all insurance plans are required to provide preventive services – as HRSA has defined them – under the ACA.

Plaintiffs' fundamental complaint is that "[s]hould they choose to certify their objection to the mandated coverage, that action inexorably leads to provision of the very coverage to which they object." Pls.' Mot. at 20. But the law requiring Kaemmerling to submit to the taking of blood or tissue samples also led "inexorably" to a result to which he objected, and the D.C. Circuit determined that was not enough to satisfy RFRA. Plaintiffs seek to distinguish *Kaemmerling* by highlighting the Circuit Court's observation that Kaemmerling did not object to submitting to the actual collection of the samples. They say, in essence, maybe Kaemmerling did not object to the first step that led to the objectionable consequences, but we do. But, in fact, Kaemmerling filed his complaint and motion for preliminary injunction to stop the first step from happening: to enjoin the Bureau of Prisons from collecting the

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duty, and the insurance issuer will have independent records of which employees enrolled for healthcare coverage.

sample. *See* Compl. *Kaemmerling v. Lappin*, No. 06-1389 [Dkt. # 1]. He did not simply sue to bar the FBI from extracting and preserving his DNA. Like Kaemmerling, the reason that plaintiffs object to the self-certification is that they object to what happens after someone else receives it. The Court is aware that plaintiffs predicate that objection on moral grounds. But if RFRA is applied to reach a religious objection to "bearing witness" to an immoral act by others, in the absence of any requirement that the objector modify his own behavior, then the law is no longer a shield, but it is a sword, and it becomes a tool to deny the equally compelling rights of thousands of other people. Nothing in RFRA jurisprudence to date takes the law that far.

Like the statute that was challenged in *Kaemmerling*, the regulations here do not "impose any restrictions on what [Catholic University] can believe or do," and it does not impose pressure on the University "to modify [its] behavior and to violate [its] beliefs." 553 F.3d at 679–80. Through the self-certification, the eligible organization raises its hand and says "I object" to participating in the provision of contraceptive services itself, and through the accommodation, the government accedes to its request and assigns the obligation to someone else. RFRA does not reach the results.

This conclusion is entirely consistent with the D.C. Circuit's recent ruling in *Gilardi*. In that case, the Court found that the Catholic owners of a for-profit corporation "are burdened when they are pressured to choose between violating their religious beliefs in managing their selected plan or paying onerous penalties." 733 F.3d at 1217; *see also Tyndale House*,

904 F. Supp. 2d at 122. But the Gilardis are secular employers who do not qualify for the accommodation and are therefore required to provide and pay for the contraceptive coverage themselves. And a close reading of the *Gilardi* opinion reveals that the case is distinguishable on those grounds.[13]

In order to determine whether the accommodation alleviates the burden that was recognized in *Gilardi*, one must first distill from the opinion what the court found that burden to be. The court began by reciting the rule that *Kaemmerling* derived from the Supreme Court's opinion in *Thomas*: "[a] 'substantial burden' is 'substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" *Id.* at 1216, quoting *Kaemmerling*, 553 F.3d at 678. The court

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[13] In *Tyndale House*, the plaintiffs were secular employers that did not qualify for the accommodation and were therefore required to provide and pay for contraceptive services. In concluding that the contraceptive mandate burdened the plaintiffs' religious exercise, the court emphasized the direct responsibility imposed on the employer to provide the objectionable coverage and the specific financial obligation imposed on the plaintiffs to pay for the contraceptives. The court found it significant that Tyndale acted as its own insurer and that "Tyndale itself directly pays for the health care services used by its plan participants." 904 F. Supp. 2d at 123.

For similar reasons, plaintiffs' many citations to *Hobby Lobby*, which is not controlling on this Court in any event, do not help resolve this case. Hobby Lobby is a self-insured, for-profit employer that does not qualify for the accommodation, and the plaintiffs there objected to "participating in, providing access to, paying for, training others to engage in, or otherwise supporting" the use of certain emergency and intrauterine contraceptives they consider to be a form of abortion. *See* 723 F.3d 1114, 1121 (10th Cir. 2013) (en banc), *cert. granted* No. 13-354, 2013 WL 5297798 (Nov. 26, 2013).

then responded to an argument that the government is not advancing in this case: that the alleged burden was too remote or attenuated to trigger RFRA because it would only arise at the point when an employee purchased contraceptives or used contraceptive services. *Id.* at 1217. The court took issue with that position:

> The burden on religious exercise does not occur at the point of contraceptive purchase; instead, it occurs when a company's owners fill the basket of goods and services that constitute a healthcare plan. In other words, the Gilardis are burdened when they are pressured to choose between violating their religious beliefs in managing their selected plan or paying onerous penalties.

Id. This passage suggests that the Circuit Court would find a substantial burden if the regulations, as revised, imposed obligations on Catholic University to take affirmative steps to include the objectionable products and services as part of its plans. That is not the case for an employer that offers a group insured plan in any event.[14] But the court's statement more directly addresses the question of when the burden attaches, not what it consists of. It was later in the

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[14] The accommodation requires insurance issuers to "[e]xpressly exclude contraceptive coverage" from the group health plan. 29 C.F.R. § 2590.715–2713A(c)(2)(i)(A). So even if the D.C. Circuit meant to define the RFRA burden with its shopping cart metaphor, the accommodation differentiates Catholic University from the Gilardis because the University is not required to "fill the basket of goods and services that constitute a healthcare plan" with contraceptive services coverage. *See Gilardi*, 733 F.3d at 1217.

opinion that the court more specifically described the burden that had been imposed upon the *Gilardis* that warranted relief under RFRA:

> The contraceptive mandate demands that owners like the Gilardis meaningfully approve and endorse the inclusion of contraceptive coverage in their companies' employer-provided plans, over whatever objections they may have. Such an endorsement – procured exclusively by regulatory ukase – is a "compel[led] affirmation of a repugnant belief." That, standing alone, is a cognizable burden on free exercise.

Id. at 1217–18. Finally, the court found that the burden was substantial because the government commands employer compliance with financial penalties, thereby giving the Gilardis a "Hobson's choice:" comply with the mandate and participate in what they believe to be a grave moral wrong, or abide by the tenets of their faith and pay devastating penalties. *Id.* at 1218.

Here, plaintiffs seize upon the Hobson's choice language and the Circuit Court's observation that if the risk of a $14 million fine "is not 'substantial pressure on an adherent to modify his behavior and to violate his beliefs,' we fail to *see* how the standard could be met." *Id.* But the question to be resolved here is not whether an acknowledged burden has been rendered substantial by the threat of financial consequences for noncompliance but whether the compelled conduct imposes a meaningful burden on plaintiff's religious exercise at all.

Unlike the Gilardis, the plaintiff nonprofit religious organizations in this case become eligible for the accommodation as soon as they state that they

oppose providing coverage on the basis of their religious beliefs. 29 C.F.R. § 2590.715–2713A(a). This is exactly the opposite of the "compelled affirmation of a repugnant belief" that was at the heart of *Gilardi*, and it is a distinction that cannot be ignored. Furthermore, the accommodation explicitly provides that, "[w]ith respect to payments for contraceptive services, the [insurer] may not impose . . . any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization." *Id.* § 2590.715–2713A(c)(2)(ii). This relief, which was not available to the Gilardis, cuts off any obligation of the self-certifying organization to pay for the contraceptive services of its employees or students. *Id.* So the case is not governed by *Gilardi*, and it is distinguishable from the decision in this District in *Tyndale House*.[15]

Plaintiffs seem to recognize what the law prohibits, and they put it succinctly in their own pleading: "Plaintiffs' only request has been that they not *themselves* be made the vehicle by which the mandated coverage is delivered." Pls.' Reply at 4. Under the terms of the accommodation, Catholic University has in fact been relieved of any obligation to *itself* be the vehicle by which the coverage is delivered. The Court finds that the University has not met its burden under RFRA to establish a substantial burden on its exercise of religion and

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[15] The Court's conclusion can also be squared with *Geneva College v. Sebelius*, 941 F. Supp. 2d 672 (W.D. Pa. 2013), which addressed the contraceptive mandate before the accommodation was promulgated and relied heavily on the fact that the plaintiffs in that case had to arrange and pay for a health insurance plan that included the contraceptive services coverage.

thereby trigger the application of strict scrutiny.[16] Defendants are therefore entitled to summary judgment on Catholic University's RFRA claim.[17]

B. The accommodation falls short of relieving the burden on Thomas Aquinas College's religious exercise.

Thomas Aquinas College is a Catholic institution that adheres to the same religious beliefs as Catholic University: that interfering with conception is immoral, and that it is equally wrong to take actions that would facilitate the use of contraceptives by others. Aff. of TAC ¶¶ 12–14. Unlike Catholic University, the College provides benefits on a self-insured basis, and it offers its employees health insurance through the RETA Trust, "which is a self-

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[16] Additionally, for the reasons stated below in footnote 24, the contraceptive mandate does not impose a burden on Catholic University's religious exercise even though it requires that the University's student health insurance plan include coverage for contraceptive services. Not only does the accommodation effectively eliminate any potential facilitation on Catholic University's part, but the fact that the ACA does not mandate the University to provide a student health insurance plan removes the government compulsion necessary to find a RFRA burden. *See infra* note 24.

[17] The Court is not basing its holding on the government's argument that the fact that the plaintiffs provide their employees with a salary that might ultimately be used to purchase contraceptive services means that the mandate does not impose its own religious burden. If plaintiffs voice religious objections to providing, paying for, and facilitating contraceptive themselves, but they do not object to paying a salary that could potentially be used for the purchase of contraceptives by the employees, it is not for the Court "to say that the line [plaintiffs] drew was an unreasonable one. Courts should not undertake to dissect religious beliefs . . . ." *Thomas*, 450 U.S. at 715.

insurance trust set up by the Catholic bishops of California for the purpose of providing medical coverage consistent with Catholic moral teaching."[18] *Id.* ¶ 8. The self-insurance trust is administered by a third-party administrator, Benefit Allocation System, *id.*, and the parties have informed the Court that, notwithstanding the bishops' involvement, the plan does not constitute a church-sponsored plan under ERISA. Supp. Aff. of TAC ¶ 6.

Under the regulations, a self-insured organization that wishes to avail itself of the accommodation must also certify its eligibility as a religious, nonprofit entity that opposes providing coverage for contraceptive services under 29 C.F.R. § 2590.715–2713A(a)(4). Under section 2590.715-2713A(b), a health plan established or maintained by an eligible organization that provides benefits on a self-insured basis then complies with the mandate to provide contraceptive coverage if:

> (i) The eligible organization or its plan contracts with one or more third party administrators.
>
> (ii) The eligible organization provides each third party administrator . . . with a copy of the self-certification . . . , which shall include notice that –
>
> (A) The eligible organization will not act as the plan administrator or claims

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[18] Thomas Aquinas College's RFRA claim refers only to its employee healthcare plan. It has not asked the Court to address whether the contraceptive mandate imposes a RFRA burden on the school by requiring that any student health insurance plan include contraceptive services coverage.

> administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and
>
> (B) Obligations of the third party administrator are set forth in [the applicable regulations].
>
> (iii) The eligible organization must not, directly or indirectly, seek to interfere with a third party administrator's arrangements to provide or arrange separate payments for contraceptive services . . . and must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements.

29 C.F.R. § 2590.715-2713A(b)(1). If a third-party administrator receives a copy of the self-certification and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services, then *it* is bound to provide or arrange for separate payments for the contraceptive services. *Id.* § 2590.715-2713A(b)(2). The third-party administrator may provide for the payments itself, or it may arrange for an insurance issuer or another entity to do so, but in no event may any cost-sharing, premium, or fee be imposed, directly or indirectly, on the religious organization or its plan. *Id.* § 2590.715-2713A(b)(2)(i)– (ii).

So while this section of the regulations is also designed to accomplish the goal of relieving the religious organization of the burden of providing contraceptive coverage, by transferring that obligation to a substitute and shielding the organization from absorbing the cost in any way,

there are several differences between what happens in the case of a self-insured entity and in the insured group health plan scenario. First, neither the ACA nor the accommodation itself imposes a mandatory obligation on the third-party administrator to accept responsibility to provide contraceptive services coverage on behalf of the self-certifying organization. One of the steps required for plan compliance is that the organization or its plan contract with a third-party administrator, and under the terms of the accommodation, the third-party administrator's obligation to provide contraceptive coverage arises only if it receives a copy of the self-certification "and *agrees to enter into* or *remain in* a contractual relationship with the eligible organization or its plan to provide administrative services for the plan." *See id.* § 2590.715–2713A(b)(2) (emphases added). As a result, if a third-party administrator declines to assume the responsibility to provide coverage for contraceptive services on behalf of the self-certifying religious organization, the third-party administrator can no longer serve in that capacity for the organization's plan, and the organization must either shop around to find a new third-party administrator that will assume responsibility for the coverage or proceed without a third-party administrator and await instructions from the government on how it can otherwise satisfy its obligations. *See id.*; *see also* 78 Fed. Reg. at 39880–81.[19]

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[19] The regulations do not spell this out explicitly, but both parties agree that this is what they will entail. The Court has questions about how this set of provisions will operate in practice in a situation such as the one presented by Thomas Aquinas College, where the third-party administrator may be in

Second, the accommodation operates differently in the self-insured context than in the insurer context because, should the third-party administrator agree to assume responsibility for the contraceptive services coverage, the regulations provide that the self-certification form itself "shall be an instrument under which the plan is operated [and] shall be treated as a designation of the third party administrator as the plan administrator under section 3(16) of ERISA for any contraceptive services required to be covered." 29 C.F.R. § 2510.3–16(b); *see also id.* § 2590.715–2713A(b)(1)(ii)(B). In other words, it is "plan administrators" who have the obligation under ERISA to carry out the contraceptive mandate, and unlike health insurance issuers in the insured plan context, the third-party administrator would not have this obligation unless it was conferred on it by law in some way. A religious organization's self-certification provides that the organization will not be acting as the plan administrator for purposes of compliance with the contraceptive mandate, and it directs the third-party administrator to the rules that will govern its responsibilities. *Id.* § 2590.715–2713A(b)(ii).[20]

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a contractual relationship with the plan but not with the eligible organization, and the plan and plan administrator may have religious objections of their own, but the Court has come to its conclusion based on the fact that this obligation to secure a compliant third-party administrator is by all accounts a critical feature of the accommodation for self-insured plans.

[20] In this case, the College does not serve as the ERISA plan administrator in any event. *See* Pl. TAC's Dec. 17, 2013 Resp. to Order of the Ct. [Dkt. # 42].

Finally, in the insurance context, the regulations expressly require insurers to carve out contraceptive services coverage from the self-insured organization's plan. The third-party administrator will be separately arranging for and paying for the coverage, but under the auspices of the plan. As counsel for the government stated at the hearing, "[i]n the self-insured case, technically, the contraceptive coverage is part of the plan, [even though] the responsibility to make the payments . . . is entirely the [third-party administrator's]." Mot. Hr'g Tr. 18.

In evaluating Thomas Aquinas College's RFRA claim, then, the question becomes whether any of these differences are meaningful for purposes of the burden analysis.

In the Court's view, the obligation to take affirmative steps to identify and contract with a willing third-party administrator if the existing third-party administrator declines forces the religious organization to *do* something to accomplish an end that is inimical to its beliefs. This involves the organization in facilitating access to contraceptive services, which the College has averred it cannot do, and it entails the critical element of modifying one's behavior. Therefore, the College has met its burden to identify a burden on religious exercise imposed by the regulations governing self-insured plans.

The Court is less persuaded that the mere fact that the arrangements and payments for the contraceptive coverage arise under the auspices of the organization's healthcare plan is enough to constitute a burden, even if the exclusion of the coverage from an insured group plan makes the

government's case stronger in that situation. A court could conclude that, since one of the founders and a Vice President of the College has averred that "[p]roviding health insurance coverage that includes coverage for [contraceptive services] is . . . inconsistent with the core moral and religious beliefs of the College," Aff. of TAC ¶ 12, and a court is bound by law to accept a litigant's sincere statement of his religious beliefs, the Court must base a finding that there is a burden on those grounds. But the fact that the payments are to be made as part of the plan, as opposed to a separate plan, is a technicality driven by the intricacies of ERISA and the insurance industry and the recognition that the third-party administrator can only advance "payments" and not issue a "policy." Nothing about those details changes the fact that any actions the third-party administrator takes with respect to contraceptive coverage must be completely independent from the eligible organization. The payments are totally separate from and cannot be imposed upon the religious organization, and the third-party administrator can even arrange for an entirely separate insurance issuer to provide the payments. So the argument that the problem arises because the coverage is still being offered under the auspices of the religious organization's plan is difficult to distinguish from the argument the Court has already rejected: that the organization is burdened based upon objectionable consequences, and the Court will not predicate its decision in the College's favor on those grounds.

With respect to the self-certification, an argument can be made there is something qualitatively different about the act of self-certifying in the context

of a self-insured entity that is different from the group plan scenario. That cuts both ways. On the one hand, the self-insured organization's certification contains additional language that explicitly cuts itself out of the process: it provides that the organization will not be the plan administrator for purposes of the delivery of the coverage. 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(A).

But on the other hand, the regulations provide that an eligible organization's self-certification "shall be an instrument under which the plan is operated" and "shall be treated as a designation of the third party administrator as the plan administrator under section 3(16) of ERISA for any contraceptive services required to be covered." *Id.* § 2510.3–16. Defendants explain the practical significance of that regulatory provision:

> [W]hen a [third-party administrator] receives a copy of the self-certification from an eligible employer that sponsors a self-insured group health plan, that [third-party administrator] becomes an ERISA Section 3(16) plan administrator and claims administrator for the purpose of providing the separate payments for contraceptive services. Thus, the contraceptive coverage requirements can be enforced against such [third-party administrators] through defendant Department of Labor's ERISA enforcement authority.

Defs.' Opp. & Reply at 6 (citations omitted). One could argue, then, that when Thomas Aquinas College files its self-certification, it will be taking more of an affirmative step to help secure women's access to contraceptive services than Catholic

University will be, and therefore, the Court should find that it is acting in a manner that is inconsistent with its religious beliefs.

The Court sees the differences in the nature of the self-certification to be, again, primarily a problem of consequences. What the religious organization is being asked to *do* is the same: to express its religious objection. That action eliminates any obligation to provide or pay for contraceptive services, and then it is the regulations that operate to assign the obligation to someone else and to give the self-certification its legal import. In other words, defendants have done it, not the College. While the contraceptive coverage may still be under the broad roof of one health plan that is being offered, the government has assigned a new plan administrator the job of offering entirely separate shelter for that purpose under its own umbrella. So unless the religious organization has been forced to run around with the umbrella and find the person to hold it, hasn't the accommodation succeeded in granting plaintiffs' "*only* request . . . that they not *themselves* be made the vehicle by which the mandated coverage is delivered?" *See* Pls.' Reply at 4 (first emphasis added).

It is helpful to remember that, despite plaintiffs' reliance on *Gilardi*, the *Gilardi* court was not concerned with results. It did not hold that the Gilardi's rights were violated because their employees would receive access to contraception by virtue of their participation in the Gilardis' plan or even because contraceptive services would be included in the plan. That question was not presented. What animated the court was its

observation that the mandate – without the accommodation – "demands that owners like the Gilardis *meaningfully approve and endorse* the inclusion of contraceptive coverage in their companies' employer-provided plans." *Gilardi*, 733 F.3d at 1217–18 (emphasis added). If the third-party administrator accepts the obligation, and there is no obligation placed upon the religious organization to secure another, these circumstances have also been eliminated by the accommodation in the self-insured context. Once again, there is no compelled affirmation of a repugnant belief.

But the operative word in that sentence is "if." If the third-party administrator declines to serve, a series of duties and obligations will fall to the religious organization. If the third-party administrator stays in the contractual relationship but fails to carry out its obligations, then the College's self-certification may be the tool which gives the government its ERISA enforcement authority. Looking at section 2590.715-2713A(b) as a whole, the Court finds that Thomas Aquinas has met its burden to show that the mandate, even as revised by the accommodation, imposes a burden on its religious exercise. Since that burden comes upon pain of substantial financial penalties, *see* 26 U.S.C. § 4980H, the Court must find it to be substantial. *Gilardi*, 733 F.3d at 1218.

Once the Court determines that the regulations impose a substantial burden on plaintiff's religious exercise, it must go on to decide whether the application of the burden is in furtherance of a compelling interest and whether it is the least restrictive means of furthering that interest.

Defendants have conceded that the *Gilardi* decision requires the Court to find that contraceptive mandate does not survive strict scrutiny,[21] thus the Court concludes that Thomas Aquinas College is entitled to summary judgment on its RFRA claim.

C. The remaining plaintiffs do not have standing to raise a RFRA claim.

The rest of the plaintiffs – Catholic Academies, Archbishop Carroll, Don Bosco, Mary of Nazareth, Catholic Charities, Victory Housing, and the Catholic Information Center (collectively, the "church plan plaintiffs") – provide their employees with health insurance through the Archdiocese's self-insured health plan. Pls.' SOF ¶ 5. The government contends that, therefore, they do not have standing to bring a RFRA challenge to the contraceptive mandate, and it has raised a significant jurisdictional concern. While this Court, like the court in the Eastern District of New York, is troubled by defendants' delay in appreciating the implications of their own regulations, *see Roman Catholic Archdiocese of N.Y. v.*

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[21] *Gilardi* addressed the burden imposed by the mandate itself on an employer that could not avail itself of the accommodation, and the Court found that the interests identified by the government were not sufficiently compelling, but even if they were, the mandate was not narrowly tailored to achieve those goals. 733 F.3d at 1219–24. For all of the reasons set out in this section of the opinion, the Court is not certain that the application of strict scrutiny would lead to the same conclusion in the context of weighing the acts required of a religious organization under the accommodation against the government's interests, and it believes that the less restrictive means test would not be governed by the analysis in *Gilardi* since that Court was not assessing the provisions in the accommodation.

Sebelius, No. 12-2542, 2013 U.S. Dist. LEXIS 176432 (E.D.N.Y. Dec. 13, 2013), that circumstance does not alter the fact that they are correct.

The government's authority to enforce a third-party administrator's obligation to provide contraceptive services coverage on behalf of a self-certifying organization under the accommodation is derived from ERISA. It is ERISA that accords the government authority to penalize any third-party administrator that undertakes to pay for the coverage by remaining in its contractual relationship with the self-certifying organization but then fails to make the necessary payments or arrangements. *See* 29 C.F.R. § 2510.3–16(b); Mot. Hr'g Tr. 31. Thus, ERISA is essential to the accommodation's regulatory scheme. It is well-settled, though, that church plans – such as the plan maintained by the Archdiocese – are explicitly exempt from the requirements of ERISA. 29 U.S.C. § 1003(b)(2) (2012). The government therefore has no authority to enforce the third-party administrator obligations under the accommodation against the administrator of a church plan. Defs.' Opp. & Reply at 5–7.

Based on this regulatory framework, defendants argue that the church plan plaintiffs do not have standing. The church plan plaintiffs are self-insured under the Archdiocese's plan, that plan constitutes a church plan under ERISA, and the government lacks authority to require the Archdiocese's third-party administrator to provide contraceptive services coverage on behalf of the church plan plaintiffs, even if they furnish their self-certifications. As a result, defendants argue, the church plan plaintiffs have not alleged an actionable injury: they may object to

facilitating access to contraceptive services, but the facts indicate that they will not actually be facilitating access to contraceptive services by offering a health insurance plan or by self-certifying under the accommodation because, once they self-certify, there is no imminent risk that their third-party administrator will provide the objectionable coverage, and the government cannot force it to do so. *Id.* The Court agrees.

To satisfy the injury-in-fact requirement of standing, a plaintiff must suffer an invasion of a legally protected interest that is both (a) concrete and particularized and (b) actual or imminent. *Lujan*, 504 U.S. at 560. An injury that is merely conjectural or hypothetical does not suffice. *Id.* Here, the church plan plaintiffs allege the same burden under RFRA as Catholic University and Thomas Aquinas College: that requiring them to facilitate access to contraceptive services violates their sincerely held religious belief. In other words, as they cast their RFRA claim, plaintiffs' claimed injury arises when the provision of contraceptive coverage has been facilitated by their actions and their beliefs have thereby been violated. Although the church plan plaintiffs are self-insured, and they are under the same obligation as Thomas Aquinas to self-certify and to transmit the form to the third-party administrator, that conduct does not give rise to a concrete, actual or imminent, cognizable injury in fact when it is performed by the church plan plaintiffs because there is no reason to believe that anything will happen after that.

For example, the church plan plaintiffs have not shown that they are injured by the requirement in

the ACA that they provide a health insurance plan that includes access to contraceptive services because there is no indication in the record that the coverage under their plan – the Archdiocese plan – is going to change. *See* Pls.' Submission in Resp. to Order at 12–13 [Dkt. # 39].[22] In response to specific questions from the Court on this topic, the government has unequivocally stated that the church plan plaintiffs will be in full compliance with the mandate if they provide the self-certification to the third-party administrator of their plan under section 2590.715–2713A(b)(1)(ii) and abide by the provisions of section 2590.715– 2713A(b)(1)(iii).[23] Defs.' Resp. to Ct. Order at 1–3 [Dkt. # 40].

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[22] Plaintiffs argue that the accommodation itself is mandatory on its face and that, for purposes of standing, the Court should assume that its third-party administrator will comply "with its legal obligations as stated in the federal regulations" regardless of whether ERISA applies. Pls.' Submission in Resp. to Order at 12. Although there are some contexts in which the "possibility that third parties may violate the law is too speculative to defeat standing," *Tel. & Data Sys., Inc. v. FCC*, 19 F.3d 42, 48 (D.C. Cir. 1994), this is not one of those situations. The government has conceded that, under the accommodation, a church plan third-party administrator has *no* legal obligation to provide contraceptive services and may remain in its contractual relationship with the church plan plaintiffs even if it declines to provide that coverage. Given the representations contained in the Archdiocese's affidavit concerning the manner in which it intends to operate its plan, it is reasonable to infer that the Archdiocese's third-party administrator will decline to assume additional responsibilities to provide coverage or to actually provide that coverage when it has been told by the enforcing agency that it has no legal duty to do so.

[23] 29 C.F.R. § 2590.715–2713A(b)(1) provides that a group health plan "established or maintained by" an eligible organization that provides benefits on a self-insured basis

> QUESTION BY THE COURT: If the church plan "plaintiffs submit the self-certification to the third-party administrator of the church plan pursuant to section [2590.715–2713A(b)(1)(ii)], would those plaintiffs then be in full compliance with the regulatory regime provided that they do not violate section [2590.715–2713A(b)(1)(iii)]?"
>
> DEFENDANTS: "Assuming that they do not violate section [2590.715– 2713A(b)(1)(iii)], and that they maintain the self-certification form and make it available for examination upon request, then the self-certifying non-Archdiocese plaintiffs who cover their employees under the church plan . . . would be in full compliance with the regulatory regime."

Id. at 1 (citation omitted).

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complies with the contraceptive mandate if the eligible religious organization "or its plan" contracts with a third-party administrator, and the eligible organization provides the self-certification to the third-party administrator. The church plan plaintiffs question whether they are obligated to do anything under this provision because they have not "established or maintained" the plan – it is the Archdiocese's plan. Joint Submission in Resp. to Order at 1–2, 5 [Dkt. # 36]. Based on the authority cited by plaintiffs on this point, the Court concludes that the church plan plaintiffs have "established or maintained" the Archdiocese plan for purposes of this section. *See Anderson v. UNUM Provident Corp.*, 369 F.3d 1257, 1265 (11th Cir. 2004); *Peckham v. Gem State Mut. of Utah*, 964 F.2d 1043, 1049 (10th Cir. 1992). If the Court and the government are incorrect about that and the church plan plaintiffs have not "established or maintained" the plan that they expressly aver they offer to their employees, then they clearly would not have standing to bring an action challenging this provision.

Moreover, the self-certification alone is not enough to enable the church plan plaintiffs' employees to obtain payments for the contraceptive services: the third-party administrator must assume that responsibility. In the context of the Archdiocese plan, there is no reason to believe that is an actual, imminent possibility. *See* Aff. of Archdiocese ¶ 15 ("Consistent with Catholic teaching, the Archdiocese has historically excluded coverage for abortion [and] contraceptives (except when used for non-contraceptive purposes) . . . ."). And the government has made it clear that plaintiffs will *not* be obliged to shop for another one. *See* Defs.' Resp. to Ct. Order at 3 ("If the non-Archdiocese plaintiffs submit the self-certification to the [third-party administrator ("TPA")] of the Archdiocese's self-insured church plan, and the TPA does not agree to provide or arrange for payment for contraceptive services, then the non-Archdiocese plaintiffs are *not* required to identify another TPA to perform that function."). Instead, in the context of the church plan, ERISA enforcement is lacking, and the government can neither require the third-party administrator of a church plan to end its contractual relationship for failing to assume responsibility for contraceptive services coverage nor penalize the third-party administrator that assumes the responsibility if it fails to actually provide that coverage.

Finally, there is no concern in this context that, by requiring the church plan plaintiffs to file a self-certification form, the government is compelling those plaintiffs to transform their contractual relationship with their third-party administrator or to provide the instrument that will serve as the legal authority to enforce the third-party administrator's

obligations under the accommodation. A church plan is not subject to ERISA, 29 U.S.C. § 1003(b)(2); therefore, a third-party administrator of a church plan cannot be transformed into an ERISA plan administrator just because the self-certification is filed. The church plan plaintiffs have not alleged an injury in fact that will flow from filing the self-certification form because that form has no effect other than to relieve their burden to provide contraceptive services coverage. Therefore, the church plan plaintiffs lack standing to bring the RFRA claim in Count I.

But even if one were to conclude that the church plan plaintiffs have standing to press their RFRA claim because they are still obligated to complete the self-certification form, they have not met their burden to establish that there is a RFRA burden on their religious exercise. Since the regulatory obligation to provide a health insurance plan and to self-certify a religious objection does not compel the church plan plaintiffs to provide contraceptive coverage or to facilitate the delivery of that coverage contrary to their principles, the Court concludes that neither the contraceptive mandate nor the accommodation places a burden on the church plan plaintiffs' religious exercise.[24]

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[24] There are additional grounds why, even if the Court found that the church plan plaintiffs sufficiently alleged an injury to satisfy standing, Catholic Information Center and Don Bosco do not have a successful RFRA claim. Unlike the other plaintiffs, Catholic Information Center and Don Bosco have less than fifty employees and are not subject to the employer mandate. Supp. Aff. CIC ¶ 4; Supp. Aff. Don Bosco ¶ 4. So, they provide health insurance to their employees on a voluntary basis. Although employers who provide health insurance voluntarily must still

The Court will grant defendants' motion to dismiss the church plan plaintiffs' RFRA claims for lack of standing.

II. Defendants are entitled to summary judgment on the Free Exercise Clause claim in Count II.[25]

The Free Exercise Clause of the U.S. Constitution provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const. amend. I. The Supreme Court has made clear that this constitutional right "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[26]

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comply with the contraceptive mandate and face penalties for failure to do so, *see* 42 U.S.C. § 300gg-13(a); Mot. Hr'g Tr. 36, plaintiffs simply are not in the same position as those subject to the employer mandate because they can choose to not provide health insurance in order to exercise their religious belief of not facilitating access to contraceptive services. Any potential penalty resulting from that decision – such as difficulty recruiting employees without offering a health insurance plan – is the product of the conditions of the marketplace and is not imposed by the government. It therefore cannot be said that Catholic Information Center and Don Bosco suffer a cognizable RFRA burden because they are not in a position where the *government* is placing pressure on them to violate their religious beliefs in order to avoid a *government* imposed penalty.

[25] In this section, "plaintiffs" refers only to Catholic University and Thomas Aquinas because the remaining plaintiffs do not have standing to argue that the contraceptive mandate violates the Free Exercise Clause. *See supra* section I.C.

[26] It was this articulation of the Constitution's religious protection that prompted Congress to bring religion back into the equation with RFRA. *See Holy Land Found.*, 333 F.3d at

Smith, 494 U.S. at 879 (internal quotation marks omitted); *see also Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 594–95 (1940) ("The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities."). The Court must apply strict scrutiny only when a law is either not neutral or not generally applicable. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993). When assessing whether a law is neutral and generally applicable, the two inquiries tend to overlap and "failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Id.* at 531.

Here, plaintiffs argue that the contraceptive mandate violates the Free Exercise Clause because it is neither neutral towards religion nor generally applicable because it is subject to numerous exceptions. Compl. ¶¶ 252–68; *see also* Pls.' Mot. at 29–32. The Court disagrees.

A. The contraceptive mandate is neutral.

A law is not neutral if it targets religious beliefs because of their religious nature or "if the object of a law is to infringe upon or restrict practices because of their religious motivation." *Lukumi*, 508 U.S. at 533. A discriminatory object may be present on the face of the challenged provision when the text "refers to a religious practice without a secular meaning discernible from the language or context." *Id.* For example, *Lukumi* involved a city ordinance that

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166–67. RFRA is statutory, however, and therefore has no bearing on the claims asserted under the Free Exercise Clause.

prohibited animal sacrifice and the Supreme Court noted that the use of words such as "sacrifice" or "ritual" – which are religious in origin – might suggest that the city's ordinance is discriminatory on its face. *Id.* at 533–34. A discriminatory object may also exist where the challenged provision, in operation, targets religious practice in general, or certain religions' practices specifically, for unfavorable treatment. *Id.* at 534 (noting that the Free Exercise Clause also "'forbids subtle departures from neutrality' and 'covert suppression of particular religious beliefs'").

Here, plaintiffs do not argue that the text of the contraceptive mandate is facially discriminatory, and the Court finds nothing in the language of the contraceptive mandate that would suggest that it is not neutral towards religion. *See id.* at 531. Instead, plaintiffs assert that the law is not neutral because "the Mandate was part of a conscious political strategy to marginalize and delegitimize Plaintiffs' religious views on contraception by holding them up for ridicule on the national stage." Pls.' Mot. at 31. None of plaintiffs' arguments relate to the actual effects of the contraceptive mandate or suggest that, as applied, the contraceptive mandate only burdens – and thus targets – religion. Because a lack of neutrality towards religion must be evident in the practical effects of the challenged provision – not just in what a party claims was in the minds of those who influenced or promulgated it – and because the contraceptive mandate does not operate to single out religion in general, or any religions specifically, for unfavorable treatment, it is neutral for purposes of the First Amendment.

Indeed, the availability of a religious employer exemption that completely exempts the Catholic Church from the requirements of the contraceptive mandate cuts against the conclusion that the contraceptive mandate was specifically designed to oppress those of the Catholic faith as plaintiffs suggest. *See id.* The Church employs over 2,100 individuals in the District of Columbia alone. *See* Aff. of Archdiocese ¶ 8.

Moreover, the contraceptive mandate applies equally to religious and nonreligious employers. It does not operate, as the Supreme Court put it in *Lukumi*, so "that almost the only conduct subject to [the ordinances was] the religious exercise" of a specific church. 508 U.S. at 535. All employers that offer a healthcare plan – whether they do so voluntarily or by virtue of the ACA, and whether they are religious or nonreligious – must include cost-free coverage of a range of preventive services, including contraceptive services, in their plans.[27] This makes

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[27] That some employers may be exempt from this requirement because they qualify for the "grandfathered-plan exemption" does not change the conclusion that the contraceptive mandate imposes an equal burden on religious and nonreligious employers. Not only is the grandfathered-plan exemption of temporary duration and therefore only allows qualifying plans to avoid compliance with the contraceptive mandate for a limited time, the grandfathered-plan exemption is available to both religious and nonreligious employers equally. It therefore does not operate to impermissibly target religion for unfavorable treatment. *See* Am. Family Ass'n, 365 F.3d at 1171 (noting that any discrimination against decentralized organizations in the FCC's point system was felt by both religious and nonreligious employers and any "differential impact . . . on . . . religion [was] neither . . . severe and targeted nor so unrelated to the FCC's

the law neutral. *See Am. Family Ass'n v. FCC*, 365 F.3d 1156, 1171 (D.C. Cir. 2004) (noting that the point system FCC used to award noncommercial education broadcast licenses was neutral because "the rule on its face appear[ed] also to disadvantage nonreligious centralized broadcasting networks" and therefore did not place a burden "on religious organizations 'but almost no others'").

The fact that many nonreligious employers may have provided coverage for contraceptive services prior to the contraceptive mandate does not change the analysis. The contraceptive mandate imposes a new burden on employers who already provide contraceptive services coverage – they must now provide contraceptive services coverage *for free* – and it eliminates the right of those employers to change their mind. Because the practical effect of the contraceptive mandate is to treat religious and nonreligious employers the same, that weighs in favor of finding the provision to be neutral towards religion.

The finding of neutrality is also supported by the fact that the mandate's requirements are closely related to its stated goals.[28] *See Lukumi*, 508 U.S. at

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legitimate regulatory interests as to be a religious gerrymander").

[28] Although the D.C. Circuit found that the government's interests in public health and equal access to healthcare for women are not compelling interests and that the contraceptive mandate is not narrowly tailored to achieve those interests, *Gilardi*, 733 F.3d at 1219–24, those interests may still serve as evidence of neutrality in this case because the Court is concerned not with whether the contraceptive mandate survives strict scrutiny, but with whether the stated goals are so unrelated to the regulatory mechanism as to raise suspicions

538. The final rules state that the purpose of the contraceptive mandate is to facilitate access to cost-free contraceptive services, which defendants have determined will help to improve the health of women and newborn children, decrease healthcare coverage cost disparities among women and men, and foster great equality for women in the workplace. 78 Fed. Reg. at 39872–73, 39887. Whether or not one agrees that access to cost-free contraceptive services will actually produce those desired outcomes, the contraceptive mandate's requirements are aimed at promoting those asserted interests and are not so unrelated as to arouse suspicion. Cf. *Lukumi*, 508 U.S. at 538–39 (expressing concern that ordinances banning animal sacrifice prohibited more religious conduct than was necessary to prevent improper disposal of animal remains or to prevent animal cruelty). Thus, the contraceptive mandate is neutral in its practical effect, and it is related to its specified, neutral regulatory interests.

Plaintiffs point to statements by defendant Sebelius and by a key supporter of California's contraception statute, and they allege that there was a pro-choice bias on the part of the IOM committee. *See* Pls.' Mot. at 31–32. But those circumstances do not necessarily reflect hostility towards Catholicism.[29] And even though – if it can be shown

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that an otherwise neutral regulation has more sinister purposes. For the reasons provided in this section, the Court is convinced the contraceptive mandate has no ill intent toward religion or the Catholic Church.

[29] The statutory scheme itself suggests that Congress may have contemplated that HRSA's guidelines would include contraceptive services coverage. HRSA's statutory authority is derived from 42 U.S.C. § 300gg-13(a), which calls for coverage

to exist – the subjective intent of the drafters may create an inference that the object of a law is not neutral towards religion, *Lukumi*, 508 U.S. at 533, that inference is weakened when the law does not operate in a nonneutral way.[30] *See id.* at 558 (Scalia, J., concurring) ("The First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted . . . ."); *United States v. O'Brien*, 391 U.S. 367, 383 (1968) ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."); *see also id.* at 384 ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork."); *City of Renton v. Playtime Theatres*,

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for preventive services, but then specifically directs HRSA to enumerate recommended preventive services for women. 42 U.S.C. § 300gg-13(a)(4). Paragraph (1) of that section requires coverage of "evidence-based items or services that have in effect a rating of 'A' or 'B' in the current recommendations of the United States Preventive Services Task Force." *Id.* § 300gg-13(a)(1). Because many women-only preventive services, such as breast cancer screening, breastfeeding counseling, and cervical cancer screening, already fall within paragraph (1), *see* USPSTF A and B Recommendations, U.S. Preventive Services Task Force, http://www.uspreventiveservicestaskforce.org/uspstf/uspsabrecs.htm (last visited December 3, 2013), one could conclude that Congress had other women-only preventive services – such as contraceptive services – in mind. This further reduces the likelihood that the regulation was specifically designed to target adherents of the Catholic faith.

[30] Defendant Sebelius's use of sarcasm on the one occasion cited was, at most, insensitive, and the statement of the California legislator who played no role in the adoption of the rule does not bear on this case at all.

Inc., 475 U.S. 41, 47 (1986) (applying the same principle in the regulatory context). The Court therefore finds that the contraceptive mandate is neutral towards religion.[31]

B. The contraceptive mandate is generally applicable.

Plaintiffs argue that the contraceptive mandate is not generally applicable because there are exemptions to its requirements, Pls.' Mot. at 30, and they quote the sentence in *Lukumi*, which states: "[I]n circumstances in which individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of religious hardship without compelling reason." 508 U.S. at 537, quoting *Smith*, 494 U.S. at 884 (internal quotation marks omitted). But the requirement of general applicability is not the same thing as requiring a regulation to be universally applicable. *See Gillette v. United States.*, 401 U.S. 437 (1971).

First of all, the quoted language is taken from the Supreme Court's neutrality discussion in *Lukumi*. Although inquiries into a regulation's neutrality and general applicability tend to overlap, *Lukumi*, 508 U.S. at 531, the observation appears to recognize that the application of statutory or regulatory discretion

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[31] Despite plaintiffs' arguments to the contrary, the contraceptive mandate does not single out Catholicism for unfavorable treatment while leaving all other religions unaffected. It is undisputed that the exemption is available to the Catholic Church, and that the availability of the exemption for the religious-affiliated organizations turns on the nature of those organizations and not the church with which they are affiliated.

to exempt all secular objectors, leaving the rule to be enforced against a religious group only, would undermine its neutrality. *Id.* at 537 (explaining that the government exercised its discretion to determine which animal killings were necessary and therefore exempt in a way that "devalue[d] religious reasons for killing by judging them to be of lesser import than nonreligious reasons").

But here, none of the exemptions to the contraceptive mandate are individualized, and none of the exemptions require the government to exercise its discretion in a way that would allow it to "devalue[] religious reasons for [not providing contraceptive services coverage] by judging them to be of lesser import than nonreligious reasons." *See id.* All of the exemptions are available regardless of an employer's religious leanings, and an employer's ability to qualify for an exemption is not based on any subjective determination by the government. *See Am. Family Ass'n*, 365 F.3d at 1171 ("Even setting aside that nonreligious organizations also face burdens from the rule, the burden the point system foists on religious organizations is relatively modest" because "[t]here is nothing inherently related to religion in the point system's criteria"). Indeed, the availability of both the religious employer exemption and the accommodation for nonprofit religious organizations demonstrates that the government is not devaluing religious concerns, but rather, it is making efforts to accommodate them.[32]

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[32] The Third Circuit's decision in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) – even if it were binding on this Court – does not compel a contrary conclusion. In that case, the court addressed whether

The Court in *Lukumi* acknowledged that it did "not define with precision the standard used to evaluate whether a prohibition is of general application," but it indicated that the inquiry should focus on whether the challenged provision is so underinclusive that it raises suspicions as to whether it was actually designed to promote the proffered government interests. 508 U.S. at 543.

Here, the cited exceptions do not give rise to that sort of underinclusiveness. The grandfathered-plan exemption and the small employer exemption are not specific exemptions to the contraceptive mandate; instead, they are general exemptions to mandate that employers comply with all of the ACA's new essential minimum coverage requirements. These exemptions to the employer mandate do not tend to show that the

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a police department's decision to deny a religious exemption to its no beard policy violated the Free Exercise Clause and determined that the policy was subject to heightened scrutiny because it was not generally applicable. *Id.* at 365. But, the court did not simply look at the police department's beard policy, spot a secular exemption, and automatically decide that heightened scrutiny applied. Instead, the existence of a nonreligious exemption for medical reasons gave the court pause because the nonreligious exemption would undermine the stated goal of having uniform police uniforms to the same extent as if the department allowed a religious exemption to that policy. *Id.* at 366. Consequently, providing an exemption for medical reasons but not for religious reasons aroused suspicion that the government was making "a value judgment in favor of secular motivations, but not religious motivations." *Id.* However, the court was not troubled by the existence of an exemption for undercover police officers because undercover officers are not held out as police to the public, which means that their appearance did not undermine uniformity in police appearance. *Id.* Here, the only permanent exemption to the contraceptive mandate is an exemption that respects religion.

government has created so many specific exemptions to the contraceptive rules to counteract their efficacy in promoting public health and women's equality.[33] Similarly, the one-year safe harbor delaying enforcement of the contraceptive mandate is irrelevant when considering whether the contraceptive mandate is underinclusive. The safe harbor was temporary and it will expire next month, thereby eliminating any potential underinclusiveness caused by that "exemption."

The only specific exemption to the contraceptive mandate – and therefore the only potential source of underinclusiveness – is the religious employer exemption established by 45 C.F.R. § 147.131(a). The existence of a religious employer exemption, however, does not give rise to the kind of underinclusiveness that concerned the Supreme Court. *See Lukumi*, 508 U.S. at 543 (finding underinclusiveness where the ordinances "fail[ed] to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does"). It is true that the definition of religious employer includes some religious organizations and not others, but the purpose of the narrow definition was to narrow the group of employees who would be carved out of the law. *See* 78 Fed. Reg. at 39874 (explaining that defendants adopted a narrow definition of religious

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[33] Moreover, to the extent that these exemptions are relevant to the general applicability inquiry, they do not cut against a finding of general applicability because the grandfathered plan exemption is of limited duration and the small employers exemption does not exempt a small employer who voluntarily chooses to provide health insurance from the contraceptive mandate.

employer because it allowed them to respect religious objections to contraceptive services "in a way that [did] not undermine the governmental interests furthered by the contraceptive coverage requirement" because "[h]ouses of worship and their integrated auxiliaries . . . are more likely than other employers to employ people of the same faith who share the same objection [to contraceptive services], and who would therefore be less likely than other people to use contraceptive services"). In other words, the religious employer exemption was drafted narrowly in order to *prevent* the contraceptive mandate from being underinclusive.

The Court finds, then, that the contraceptive mandate is generally applicable because none of its exemptions create the type of individualized value assessment or underinclusiveness that warrants a contrary finding. Since the contraceptive mandate is both neutral and generally applicable, strict scrutiny is not triggered, and defendants are entitled to summary judgment on Count II, plaintiffs' Free Exercise Clause claim.[34]

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[34] In their motion for preliminary injunction, plaintiffs cite *Smith* and briefly discuss the language in that case that has been used to create a sort of hybrid theory of constitutional rights that would trigger the application of heightened scrutiny. Pls.' Mot. at 32. It is not clear, however, from plaintiffs' motion – or its subsequent motions that do not mention the hybrid theory – whether plaintiffs intend to assert a separate claim under the hybrid rights theory. To the extent that this was their intention, the Court finds that a hybrid rights claim must also fail. In the D.C. Circuit, the hybrid rights theory may only trigger strict scrutiny where at least one of the two asserted constitutional claims is viable. *Henderson*, 253 F.3d at 19 (noting that at least one claim must be viable because the laws of mathematics teach us that "zero plus zero equals zero"). As

III. Defendants are entitled to summary judgment on plaintiffs' compelled speech claims in Count III.[35]

The First Amendment Free Speech Clause provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. It protects not only "the right to speak freely," but also "the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *see also* W. Va. *State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). It therefore offers protection to parties subject to government compelled speech, permitting them in certain situations to remain silent. *See, e.g.*, *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* ("FAIR"), 547 U.S. 47 (2006); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974).

Here, plaintiffs claim that the contraceptive mandate unconstitutionally compels them to speak in two ways: first, plaintiffs assert that the contraceptive mandate violates the First Amendment because it compels them to provide, pay for, and facilitate access to counseling in favor of the use of contraceptive services, which they do not support. Compl. ¶¶ 269–83; *see also* Pls.' Mot. at 33. Second,

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explained throughout this opinion, plaintiffs' only viable constitutional claim is a narrow count that does not go to the contraceptive mandate, but only challenges the ban on attempts to influence a third-party administrator. *See infra* section IV. As this claim is extremely narrow and does not overlap with plaintiffs' other constitutional claims, the Court declines to use the hybrid theory to trigger strict scrutiny in this case.

[35] The Archdiocese is completely exempt from the contraceptive mandate and therefore cannot assert a compelled speech claim.

plaintiffs assert that the accommodation, in conjunction with the contraceptive mandate, compels them to engage in speech – the self-certification form – that simultaneously results in the provision of contraceptive services to which they object while depriving them of the freedom to speak on the issue of abortion and contraception on their own terms. *Id.* Although at bottom both claims deal with the constitutionality of compelled speech, they differ enough to warrant separate treatment because the former addresses the government's ability to compel a party to support third-party speech whereas the latter alleges an imposition on these plaintiffs. Neither aspect of the regulations offends the First Amendment.

A. Providing access to counseling about contraceptive services through plaintiffs' healthcare plan does not violate plaintiffs' free speech rights.[36]

Plaintiffs assert that the contraceptive mandate violates their free speech rights because it compels them to provide, pay for,[37] and facilitate access to

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[36] To the extent that Catholic University asserts this argument as part of its compelled speech claim, the argument fails because the contraceptive mandate does not require the University to offer a health plan that includes contraceptive services coverage. *See* 29 C.F.R. § 2590.715–2713A(c)(2)(i)(A). Similarly, the facts do not support the argument that the church plan plaintiffs are compelled to provide access to counseling about contraceptive services because there is no indication that the coverage will be provided to their employees. *See supra* section I.C. The only remaining plaintiff is Thomas Aquinas.

[37] Throughout their briefs, plaintiffs imply that the contraceptive mandate requires them to pay for their employees' contraceptive services. That characterization is inaccurate in

counseling that encourages, promotes, or facilitates the use of contraceptive services. Compl. ¶ 275; *see also* Pls.' Mot. at 33. More specifically, they complain that, by compelling them to provide a health insurance plan that covers third-party counseling on the topic of contraceptive services, the contraceptive mandate forces plaintiffs to facilitate third-party speech in "*favor* of such practices" and therefore violates plaintiffs' free speech rights by forcing them to "speak" in a manner inconsistent with their beliefs. Pls.' Mot. at 33 (emphasis in original).

The Court notes at the outset that the definition of preventive services incorporated into the mandate includes "patient education and counseling for all women with reproductive capacity," and not advocacy "in favor of" anything, so plaintiffs' characterization is not entirely accurate. *See* Women's Preventive Services Guidelines, HRSA, http://www.hrsa.gov/womensguidelines/ (last visited

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light of the accommodation, for which all plaintiffs admittedly qualify. Compl. ¶ 10. Under the accommodation, eligible organizations – including plaintiffs – are not required to pay for contraceptive services. 29 C.F.R. § 2590.715–2713A(b)(1)(ii)(A), (b)(2), (c)(2). Moreover, the regulations explicitly prohibit insurers or third-party administrators from passing the cost of those services through to the employer. *Id.* § 2590.715–2713A(b)(2), (c)(2); 78 Fed. Reg. at 39877, 39879. The regulations provide for separate accounting of the money used to pay for contraceptive services in order to ensure that plaintiffs' fear that their other insurance premiums would suspiciously increase does not come to fruition. 29 C.F.R. § 2590.715–2713A(d); 78 Fed. Reg. at 39877, 39879. Thus, there can be no argument that the contraceptive mandate and the accommodation violate plaintiffs' free speech rights by requiring them to subsidize third-party speech that has a content to which they object.

Dec. 12, 2013). But assuming that, in some circumstances, information and counseling about contraception could also include advice, encouragement, or instructions, the Court will consider this claim on its merits. Since plaintiffs are not obliged to personally deliver the counseling,[38] their claim is best understood as an objection to forced accommodation of third-party speech.

The government violates the First Amendment when it compels "one speaker to host or accommodate another speaker's message." FAIR, 547 U.S. at 63 ("Our compelled-speech cases are not limited to the situation in which an individual must personally speak the government's message."); *see also Pacific Gas & Elec. Co v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 20–21 (1986) (plurality opinion); *Tornillo*, 418 U.S. at 258. This is so because such governmental compulsion would deprive the compelled speaker of "the autonomy to choose the content of his own message." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 573 (1995) ("[O]ne who chooses to speak may also decide 'what not to say.'").

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[38] This is not a case where plaintiffs are being asked to personally convey a third-party or government message. *See Pacific Gas*, 475 U.S. at 20–21; *Tornillo*, 418 U.S. at 258. They are not disseminating counseling regarding the use of contraceptive services by handing out or posting pre-made materials, and they are not engaging in the counseling themselves. In fact, the regulations take pains to ensure that plaintiffs are in no way involved in the dissemination of material regarding the coverage of contraceptive services. 29 C.F.R. § 2590.715–2713A(d); 78 Fed. Reg. at 39876, 39880. Consequently, cases like *Pacific Gas* and *Tornillo* are distinguishable and do not govern this case.

In *Rumsfeld v. FAIR*, the Supreme Court concluded that a law requiring law schools to provide military recruiters with equal access to their students by "hosting" the recruiters did not violate the schools' free speech rights. 547 U.S. at 61–68. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, however, the Supreme Court reached the opposite conclusion, finding that a Massachusetts law that, in effect, "require[d] private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey," violated the parade organizers' First Amendment free speech rights. 515 U.S. at 559.

In each case, the Court called for the same initial showing: (1) that the objecting party itself was engaged in speech and (2) that accommodating the third-party speech would alter the message of the objecting party's speech. *FAIR*, 547 U.S. at 63; *Hurley*, 515 U.S. at 576–77; *see also PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980). Without satisfying this essential element, the Court suggested that there could be no compelled accommodation claim: "The compelled-speech violation in each of our prior cases . . . resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate." *FAIR*, 547 U.S. at 63.

The second factor considered by the Court in *FAIR* and *Hurley* was whether there was a risk that the third party's objectionable speech might be attributed to the objecting host speaker. *FAIR*, 547 U.S. at 65; *Hurley*, 515 U.S. at 575; *see also Turner Broad.*, 512 U.S. at 655; *PruneYard*, 447 U.S. at 87. And the

third factor considered by the Court was whether, as applied, the provision compelling a host speaker to accommodate the other's speech had any legitimate, nonspeech related purpose. *Hurley*, 515 U.S. at 578.

Here, there is no evidence that the contraceptive mandate unconstitutionally requires plaintiffs to accommodate objectionable third-party speech. Plaintiffs are not engaging in speech or inherently expressive conduct when they provide their employees with health insurance.[39] *See FAIR*, 547 U.S. at 64 (noting that "accommodating the military's message [did] not affect the law schools' speech, because the schools are not speaking when they host interviews and recruiting receptions"). So plaintiffs' compelled-accommodation claim is missing the first essential element: plaintiffs' own speech is not being used as the vehicle through which a third-party's speech is communicated. *See FAIR*, 547 U.S. at 63;

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[39] The conduct compelled by the employer mandate and contraceptive mandate is the provision of health insurance to eligible employees that contains coverage for contraceptive services. Although the First Amendment's protections extend to inherently expressive conduct, *see, e.g.*, *Texas v. Johnson*, 491 U.S. 397, 404 (1989), providing health insurance is not inherently expressive and is therefore not First Amendment speech. No insurance provider intends "to convey a particularized message" by providing insurance, and there is virtually no likelihood "that the message would be understood [as communicating a particular stance] by those who viewed it." *Id.*; *see also FAIR*, 547 U.S. at 64 (finding no third-party speech accommodation problem because "a law school's decision to allow recruiters on campus is not inherently expressive" and instead is made to facilitate recruitment and "assist their students in obtaining jobs," not express a point of view). Consequently, this case does not involve speech or inherently expressive conduct.

Hurley, 515 U.S. at 576; *PruneYard*, 447 U.S. at 87; *see also Hurley*, 515 U.S. at 568, 572 (noting that "parades are . . . a form of expression, not just motion," and that "every participating unit [in the parade] affects the message conveyed by the private organizers"). Therefore, the compelled-accommodation claim in Count III fails.

Moreover, even if plaintiffs were engaging in speech that could be altered by the availability of counseling for women about contraceptive services, any compelled accommodation of that counseling is not constitutionally problematic. First, it is unlikely that any objectionable third-party counseling would be attributed to plaintiffs simply because access to that counseling was obtained through an employer-provided health insurance plan. The Catholic Church is widely known to oppose the use of contraceptive services, and as plaintiffs assert, their faith is central to everything they do. *See* Aff. of CCA ¶¶ 7, 14; Aff. of ACHS ¶¶ 7, 14; Aff. of Don Bosco ¶¶ 7, 14; Aff. of Mary of Nazareth ¶¶ 7, 14; Aff. of Catholic Charities ¶¶ 7, 14; Aff. of ACHS ¶¶ 7, 14; Aff. of Victory Housing ¶¶ 7, 14; Aff. of CIC ¶¶ 7, 14; Aff. of CUA ¶ 13; Aff. of TAC ¶ 11. Second, the contraceptive mandate has a legitimate, nonspeech-related purpose of providing women with access to preventive services to improve the health of women and newborn children, and it is devoid of any purpose to target speech. Plaintiffs remain completely free to espouse their beliefs against the use of contraception as well as to encourage their employees not to utilize those services.[40] So plaintiffs' free speech claim is

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[40] Plaintiffs argue that the freedom to express their beliefs outside the regulatory scheme does not alleviate the compelled

also missing the other hallmarks of unconstitutional accommodation claims. The Court therefore concludes that any requirement placed on plaintiffs to accommodate the speech of third-party healthcare professionals does not interfere with plaintiffs' speech and therefore does not violate plaintiffs' First Amendment rights.[41]

B. The self-certification form does not violate plaintiffs' free speech rights.

Plaintiffs also argue that requiring them to file a self-certification form in order to invoke the protections of the accommodation amounts to compelled speech in violation of their free speech

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speech problem in this case. Pls.' Opp. & Cross-Mot. at 36. Although this Court recognizes that the freedom to express views in another context will not prevent all compelled speech from being constitutionally suspect, the Supreme Court has recognized that it is a factor that can be considered in determining whether there is a Free Speech Clause violation. *FAIR*, 547 U.S. at 65 (finding no free speech violation because the law schools remained free to say what they wished about the military's objectionable policies); *PruneYard*, 447 U.S. at 87 (noting that the mall owners remained free to express their own ideas).

[41] This conclusion is not weakened by plaintiffs' argument that requiring them to accommodate the speech of third-party counselors regarding the use of contraception violates their free speech rights because it forces them to "affirm in one breath that which they deny in the next." Pls.' Opp. & Cross-Mot. at 36, quoting *Pacific Gas*, 475 U.S. at 15–16. Plaintiffs are not affirming anything: offering health insurance that includes coverage for contraceptive services counseling is not speech. Moreover, under the terms of the accommodation, neither Catholic University, the Archdiocese, nor any of the church plan plaintiffs would be providing these services as part of their plans. To the extent that they are referring to the self-certification form, the Court addresses that argument below.

rights. Compl. ¶ 276; Pls.' Mot. at 33. First, they state that the self-certification requirement forces them "to engage in speech that triggers the provision of products and services to which they object," Pls.' Opp. & Cross-Mot. at 37, and second, "it deprives them of the freedom to speak on the issue of abortion and contraception on their own terms, at a time and place of their own choosing, outside of the confines of the Government's regulatory scheme." Pls.' Mot. at 33–34. Neither argument, however, supports plaintiffs' claim that the accommodation's self-certification requirement violates the Free Speech Clause.

1. *Requiring plaintiffs to file a self-certification form that ultimately results in the provision of contraceptive services coverage does not violate plaintiffs' free speech rights.*[42]

Plaintiffs point to the consequences of the self-certification form and argue that requiring them to file the form is compelled speech because it makes their speech the "trigger" for the provision of contraceptive services. *Id.* at 33. To support this consequence-based argument, they direct this Court's attention to the Supreme Court's decision in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011). *See* Pls.' Opp. & Cross-Mot. at 37. Plaintiffs' reliance on Bennett is misplaced.

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[42] To the extent that the church plan plaintiffs assert this argument as part of their compelled speech claim, the argument fails because there is no indication that filing the self-certification form will result in the provision of contraceptive services coverage to the church plan plaintiffs' employees. *See supra* section I.C. As a result, "plaintiffs" in this subsection refers only to Catholic University and Thomas Aquinas College.

In *Bennett*, the Supreme Court addressed the constitutionality of an Arizona law that gave publicly financed political candidates matching funds for every dollar donated to, or spent on behalf of, a privately funded candidate. 131 S. Ct. at 2813. The Court concluded that "the matching funds provision 'impose[d] an unprecedented penalty on any candidate who robustly exercise[d] [his] First Amendment right[s]'" by creating a situation where, simply by engaging in free speech, the privately funded candidate guaranteed that his or her opponent would receive a cash subsidy from the state of Arizona. *Id.* at 2818, quoting *Davis v. FEC*, 554 U.S. 724, 739 (2008) (second and third alterations in original). In other words, the Court determined that the law created a "trigger effect" by which a privately funded candidate's speech was penalized, thus resulting in a chilling effect on that political speech. *Id.* at 2824. Consequently, the Court determined that strict scrutiny should apply even though the challenged law did not fit into the typical compelled speech or subsidized speech fact pattern. *Id.*

The contraceptive mandate, the accommodation, and the self-certification form do not create a similar penalty in this case. In *Bennett*, the publicly funded candidate was only entitled to matching funds if the privately funded candidate expressed himself by expending his own funds, so the privately funded candidate's speech was the actual trigger for payment, and the Court's concern was that his speech would therefore be inhibited. *Id.* at 2821. Here, the self-certification form is not the actual trigger for coverage of contraceptive services, and there is no speech of the plaintiffs that is being chilled. Instead, the source of the contraceptive services coverage is

the ACA itself, which mandates that all health insurance plans that are not exempt must include cost-free coverage for women's preventive services. *See* 42 U.S.C. § 300gg-13(a)(4). This statutory right to contraceptive services coverage exists and attaches prior to and independent of any speech by an employer; any speech associated with the self-certification form is merely designed to relieve the religious employer of any obligation to fund the services itself and to transfer the burden of providing the coverage.[43] Since there is nothing about the consequences of filing the self-certification form that chills or inhibits plaintiffs' speech, the situation in this case is a far cry from the one in *Bennett*.

2. *Compelling plaintiffs to state their religious objections to the provision of contraceptive services coverage does not violate plaintiffs' free speech rights.*

In addition to their consequences-based argument, plaintiffs assert that the self-certification form is unconstitutionally compelled speech "because it

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[43] It makes no difference to this Court's analysis that plaintiffs may block access to contraceptive services coverage by not filing the self-certification form – and therefore not engaging in speech – and by agreeing instead to pay the applicable penalties. Once again, the underlying statutory right to coverage for contraceptive services remains in existence despite plaintiffs' choice of whether to "speak;" regardless of whether the self-certification form is filed, plaintiffs' employees are entitled to cost-free contraceptive services coverage and plaintiff will either have to provide that coverage, pay penalties, or file the self-certification form. Consequently, this is simply not a case where some expressive act by plaintiffs is the absolute and only trigger for consequences that are inimical to their interests as in *Bennett*.

deprives them of the freedom to speak on the issue of abortion and contraception on their own terms, at a time and place of their own choosing, outside of the confines of the Government's regulatory scheme." Pls.' Mot. at 33–34. In other words, plaintiffs argue that the self-certification form is speech, that it is compelled because they must file the form in order to receive the benefits of the accommodation, and that it violates their free speech rights because they should be able to decide when to speak and when to stay silent. Although it is well-settled that the Free Speech Clause protects the freedom to speak as well as the freedom to remain silent, *Barnette*, 319 U.S. at 633–34; *see also Wooley*, 430 U.S. at 714, the Court concludes that the self-certification form requirement does not violate plaintiffs' rights.

Under the regulations, the self-certification form must include the following information: (1) that the self-certifying organization "opposes providing coverage for some or all of any contraceptive services required to be covered under § 147.130(a)(1)(iv) on account of religious objections;" (2) that the organization "is organized and operates as a nonprofit;" and (3) that the organization "holds itself out as a religious organization." 29 C.F.R. § 2590.715–2713A(a). Plaintiffs do not object to the content of these statements; instead, as discussed above, they object that the consequence of these statements is the provision of coverage for contraceptive services by others. Pls.' Mot. at 9; *see also* Compl. ¶ 276 ("The U.S. Government Mandate would compel Plaintiffs to issue a certification of their beliefs that, in turn, would result in the provision of objectionable products and services to Plaintiffs' employees.").

Since it is undisputed that, to the extent the form transmits any content at all, it accurately reflects plaintiffs' beliefs, the First Amendment is not implicated. The Supreme Court has explicitly stated that a compelled speech claim involves a situation where "an individual is obliged personally to express a message he *disagrees* with, imposed by the government." *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557 (2005) (emphasis added); *see also FAIR*, 547 U.S. at 62; *Turner Broad.*, 512 U.S. at 641. And a review of other compelled speech precedent further demonstrates that the free speech clause has been historically invoked to protect against compelling an individual from speaking or endorsing a message with which the speaker disagrees. *See, e.g.*, *Wooley*, 430 U.S. at 715 (finding a free speech violation where a state law compelled an individual to display a license plate motto that articulated an "ideological point of view [the plaintiff found] unacceptable"); *Barnette*, 319 U.S. at 634 ("To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.").

The self-certification does not require plaintiffs to say anything with which they disagree; instead, it merely asks them to assert that they have a religious objection to the provision of contraceptive services – a statement that is entirely consistent with their beliefs. *See* 29 C.F.R. § 2590.715–2713A(a). The self-certification form does not contain a government-preferred message, and it does not force plaintiffs to serve as a mouthpiece to spread adherence to the

government's ideological goals.[44] *See Johanns*, 544 U.S. at 557. The self-certification form is simply part of a regulatory scheme that requires plaintiffs to state their objections on the record in order to be exempted from the regulations. *See FAIR*, 547 U.S. at 62 (finding that the Solomon Amendment did not raise free speech concerns because any compelled speech was merely incidental to the regulation of conduct). Viewed in this context, the self-certification form is no different than requiring conscientious objectors to state their objections to war in order to be excused from the draft or requiring nonprofit organizations to fill out a form to apply for section 501(c)(3) tax-exempt status. Therefore, the Court concludes that requiring plaintiffs to file the self-certification form does not violate their free speech rights, and defendants are entitled to summary judgment on Count III.

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[44] *Evergreen Ass'n v. City of New York* and *Centro Tepeyac v. Montgomery County* are distinguishable on that ground because the regulations in those cases required the plaintiffs to present a government-preferred message. 801 F. Supp. 2d 197, 201 (S.D.N.Y. 2011); 779 F. Supp. 2d 456, 458–59 (D. Md. 2011), *aff'd in part, rev'd in part*, 683 F.3d 591 (4th Cir. 2012).

IV. Plaintiffs are entitled to summary judgment on their claim that the accommodation places an unconstitutional restriction on their free speech rights in Count IV.[45]

Plaintiffs also argue that defendants violated their free speech rights by enacting what plaintiffs hyperbolically refer to as a "gag order" as part of the accommodation. Compl. ¶¶ 284– 88. The challenged provision applies only to organizations that are self-insured and use third-party administrators, and it provides that, once an organization self-certifies under the accommodation, it "must not, directly or indirectly, seek to interfere with a third-party administrator's arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries, and must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements." [46] 29 C.F.R. § 2590.715–2713A(b)(1)(iii).

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[45] Catholic University does not have standing to challenge this provision because it offers health insurance through a group health plan maintained by an insurer. *See* Aff. of CUA ¶¶ 8, 10. The Archdiocese also does not have standing to bring this claim because it is entirely exempt from the contraceptive mandate. *See* Aff. of Archdiocese ¶ 18.

[46] There is no complementary provision for organizations participating in group health insurance plans because an insurer has an automatic obligation to provide coverage upon receipt of a self-certification form, unlike a third-party administrator who may ultimately decide to not enter into, or remain in, a contractual relationship with a self-certifying organization. *Compare* 29 C.F.R. § 2590.715–2713A(b)(2), *with id.* § 2590.7152713A(c)(2).

Plaintiffs do not challenge the constitutionality of the first half of the provision, which prohibits the eligible organization from interfering with a third-party administrator's provision of the contraceptive services coverage. But they are concerned with the broad scope of the second part of the provision, which provides that a religious organization may not "directly or indirectly" influence the third-party administrator's decision as to whether it will agree to remain in a contractual relationship with the organization and assume the responsibility to provide the coverage. The Court finds that the regulation imposes a content-based limit on the religious organizations involved that directly burdens, chills, and inhibits their free speech.[47] *See Ward v. Rock*

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[47] Although on its face the regulation does not limit its prohibition only to speech seeking to dissuade the third-party administrator from providing coverage for contraceptive services, viewed in the regulatory context, there is no question that this is a content-based restriction. The restriction on speech only arises after an eligible organization self-certifies that it objects to the provision of contraceptive services and effectively shifts the burden of providing those services – or at least creates a decision as to whether the third-party administrator will accept the burden to provide those services – onto the third-party administrator. *See* 29 C.F.R. § 2590.715– 2713A(b)(1)(iii). As a result, the only organizations subject to the restriction on speech are those organizations that have already specifically stated that they object to the provision of contraceptive services. Thus, any argument that the restriction – at bottom – equally applies to speech that seeks to influence third-party administrators to cover contraceptive services, and not just speech that seeks to discourage that coverage, is frivolous. A party who self-certifies that it objects for religious reasons to providing coverage for contraceptive services simply will not turn around and try to encourage a third-party administrator to provide that coverage.

Against Racism, 491 U.S. 781, 791 (1989) (noting that the "principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys"). This type of restriction on speech is "'presumptively invalid' and subject to strict scrutiny." *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 358 (2009), quoting *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 188 (2007); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

To satisfy strict scrutiny, a law or regulation must further a compelling interest, and it must be narrowly tailored to achieve that interest. *Bennett*, 131 S. Ct. at 2817; *FEC v. Wis. Right to Life*, 551 U.S. 449, 464 (2007). The Court may not consider any potential interest that may support the challenged provision; instead, the Court's strict scrutiny analysis is limited to the interests proffered by the government. *See First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 786 (1978) (noting that "the burden is on the government to show the existence of [a compelling] interest").

Here, defendants argue that the speech restriction is meant to prevent a self-certifying organization from using its economic power to coerce a third-party administrator into declining to assume responsibility for providing contraceptive services coverage to the organization's employees. Defs.' Mem. at 36. This interest against economic coercion was deemed compelling in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618–19 (1969). But the provision does not survive strict scrutiny because it does not simply ban threats or coercion, and it is not narrowly tailored or

the least restrictive means to achieve the government's interest.

The ban contained in the provision – that self-certifying organizations "must not, directly or indirectly, seek to influence the third party administrator's decision" – is broader than it needs to be to serve the proffered interest: it restricts not only economic coercion but also any attempt to calmly discuss the moral implications of providing contraception with a third-party administrator. A rule that prohibits more expression than is needed to advance the government's goal is not narrowly tailored.[48]

The Court therefore finds that the portion of 29 C.F.R. § 2590.715–2713A(b)(1)(iii) that provides that an eligible organization "must not, directly or indirectly, seek to influence the third-party administrator's decision to make . . . arrangements"

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[48] Moreover, it is not clear whether the interest against economic coercion is actually compelling in this context. Under the current regulatory framework, a self-certifying organization has no incentive to threaten to cut ties with a third-party administrator because, if the pressure is successful, the organization simply becomes obliged to find another third-party administrator to provide that coverage, or it must operate its self-insured plan on its own. Mot. Hr'g Tr. 13–14. It is also not clear that the challenged speech restriction is related to the stated interest in preventing economic coercion because, if the third-party administrator decides on its own – free from coercion – that it does not want to assume the responsibility of providing contraceptive coverage, the regulations provide that the third-party administrator must terminate its contractual relationship with the self-certifying organization. *See* 29 C.F.R. § 2590.715 – 2713A(b)(2). In other words, the economic consequence for the third-party administrator is the same whether the religious organization has applied pressure or not.

for contraceptive services coverage violates the Free Speech Clause since it is not narrowly tailored to achieve the government's asserted compelling interest. Plaintiffs are entitled to summary judgment on Count IV.

V. Plaintiffs' First Amendment Establishment Clause claims asserted in Count V fail.[49]

The First Amendment Establishment Clause states that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. Plaintiffs claim that this clause has been violated in two ways: (1) the religious employer exemption creates an impermissible denominational preference; and (2) the religious employer exemption results in excessive entanglement between the government and the Catholic Church. Compl. ¶¶ 289–96; *see also* Pls.' Mot. at 35–38.

A. The religious employer exemption does not amount to denominational discrimination.

Plaintiffs claim that the religious employer exemption violates the Establishment Clause because it creates a preference for one type of religious organization over another. Compl. ¶ 293. They argue that, when the regulations define "religious employer" to include only houses of worship, they disfavor all other types of religious organizations, such as charities or schools. Citing *Larson v. Valente*, 456 U.S. 228 (1982), plaintiffs argue that this

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[49] In this section, "plaintiffs" refers only to Catholic University and Thomas Aquinas College. The Archdiocese qualifies for the religious employer exemption and the church plan plaintiffs are, in essence, completely exempt as well. *See supra* section I.C.

preferential treatment is subject to strict scrutiny. Pls.' Mot. at 35-36.

Under *Larson*, the reviewing court must first determine "whether the law facially differentiates among religions." *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 695 (1989). If the answer is yes, then the law is subject to strict scrutiny. *Id.* If the answer is no, the reviewing court must apply *Larson*'s second step, which requires the court to evaluate the challenged law under the three-prong test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The Court finds that the religious employer exemption does not facially discriminate among religions, so strict scrutiny does not apply. In addition, the regulation satisfies the three-prong *Lemon* test.

1. *The religious employer exemption is not subject to strict scrutiny because it does not facially discriminate among religions.*

A law facially discriminates among religions when it treats similarly situated religious organizations differently, resulting in benefits to some religious denominations but not to others. *See Larson*, 456 U.S. at 246 & n.23; *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1256 (10th Cir. 2008). The law need not explicitly state a preference for one religion over the other; facial discrimination exists so long as the law treats similarly situated religious organizations differently.[50] *Larson*, 456 U.S. at 246 n.23.

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[50] Actual discrimination among religions is necessary to find facial discrimination; disparate impact alone is not enough. For example, in *Hernandez v. Commissioner of Internal Revenue*, the Supreme Court held that section 170 of the Internal

For example, in *Larson*, the Supreme Court held that a law that subjected only those religious organizations that received over fifty percent of their charitable donations from nonmembers to disclosure requirements facially discriminated among religions. *Id.* at 246–47. The Court explained that, unlike cases where a statute had merely a "'disparate impact' upon different religious organizations," the statute at issue in *Larson* made "explicit and deliberate distinctions between different religious organizations' because "the provision effectively distinguishe[d] between 'well-established churches' that have 'achieved strong but not total financial support from their members,' on the one hand, and 'churches which

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Revenue Code of 1954 ("IRC"), 26 U.S.C. § 170, was not facially discriminatory despite its disparate treatment of religious activities. 490 U.S. at 695–96. The plaintiffs in that case challenged the constitutionality of section 170, which creates a tax deduction for charitable contributions, on the grounds that it violated the Establishment Clause because the IRS's decision to define charitable contribution as a contribution or gift, but not a transfer for consideration, meant that members of the Church of Scientology could not deduct the "fixed donations" they paid in order to receive services known as "auditing" or "training." *Id.* at 685. These fixed donations made up the bulk of the Church's revenue. *Id.* Although the definition of charitable contributions had a disproportionate effect on the members of the Church of Scientology, the Court found that section 170 did not facially discriminate among religions because the line drawn "between deductible and nondeductible payments to statutorily qualified organizations [did] not differentiate among sects." *Id.* at 695. In other words, section 170 did not facially discriminate because the disparate treatment resulting from the statute arose from the way the IRS defined charitable contributions and not from the IRS explicitly deciding which religious organizations would benefit from the deductions and which would not. *Id.*

are new and lacking in a constituency, or which, as a matter of policy, may favor public solicitation over general reliance on financial support from members,' on the other hand." *Id.* at 246 n.23, quoting *Valente v. Larson*, 637 F.2d 562, 566 (8th Cir. 1981). Different treatment of the same type of religious organization – in *Larson*, houses of worship – amounted to facial discrimination among religious denominations and therefore resulted in the discrimination that was subject to strict scrutiny. *Id.* at 246–47.

Similarly, in *Colorado Christian University v. Weaver*, the Tenth Circuit found that Colorado's scholarship program facially discriminated among religions. 534 F.3d at 1256. Under the scholarship program, institutions of higher education – including many religious schools – were entitled to receive scholarship money for qualifying students. *Id.* at 1250. But the statute exempted from the definition of institution of higher education "any college that [was] 'pervasively sectarian' as a matter of state law." *Id.* As a result, certain religious schools – such as a Catholic school and a Methodist school – were eligible to receive scholarship money while other schools – such as a nondenominational school and a Buddhist school – were not eligible. *Id.* at 1258. The court concluded that the law facially discriminated among religions because it provided aid to some sectarian schools while excluding others as "pervasively sectarian." *Id.* at 1256. In other words, the statute facially discriminated among religions when it explicitly treated religious schools of different denominations differently.

Here, plaintiffs argue that the religious employer exemption amounts to denominational discrimination

for two reasons. First, they object that the religious employer exemption treats religious organizations differently based on how they are structured or organized: Catholic houses of worship are exempt whereas Catholic educational and charitable organizations are not. Pls.' Mot. at 36; Pls.' Opp. & Cross-Mot. at 38–39. Second, they make the claim that the religious employer exemption unfairly discriminates against Catholics in particular because, unlike "denominations that exercise religion principally through 'churches, synagogues, mosques, and other houses of worship, and religious orders,'" Catholics like plaintiffs "*also* exercise their religion through schools, health care facilities, charitable organizations, and other ministries." Pls.' Reply at 21 (emphasis in original); *see also* Pls.' Mot. at 36.

Plaintiffs' first argument – that the Establishment Clause prohibits distinctions among different types of organizations affiliated with the same faith – finds no support in Establishment Clause case law. In *Larson*, the Supreme Court repeatedly spoke in terms of *denominational* discrimination or discrimination *among religions*, not structural discrimination:

- "The clearest command of the Establishment Clause is that one religious *denomination* cannot be officially preferred over another." 456 U.S. at 244 (emphasis added).
- "[N]o State can 'pass laws which aid one religion' or that 'prefer one *religion* over another.'" *Id.* at 246 (emphases added) (citation omitted).

- "This principle of *denominational* neutrality has been restated on many occasions." *Id.* (emphasis added).
- "[T]he government must be neutral when it comes to competition between *sects*." *Id.* (emphasis added) (citation omitted).
- "The First Amendment mandates governmental neutrality between *religion* and *religion*." *Id.* (emphases added) (citation omitted).
- "[W]hen we are presented with a state law granting a *denominational* preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality." *Id.* (emphasis added).
- "The fifty percent rule of § 309.515, subd. 1(b), clearly grants *denominational* preferences of the sort consistently and firmly deprecated in our precedents." *Id.* (emphasis added).

The Court's focus on denominational discrimination or discrimination among religions derives directly from the history and purpose of the Establishment Clause. *See Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 668 (1970) (noting that, "for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity" that resulted in the establishment of one state church and the suppression of all others). So plaintiffs have failed to

state a violation of the Establishment Clause on these grounds.[51]

The Court also rejects plaintiffs' second argument that the religious employer exemption amounts to denominational discrimination because it accords special treatment to religions that primarily exercise their faith through houses of worship, while discriminating against religions – such as Catholicism – that also practice their religion through charitable and educational efforts. Putting aside the fact that plaintiffs offer no evidence to support their uninformed suggestion that there is something unique about Catholics because good deeds and teaching others are intrinsic to their faith, plaintiffs' claim fails because it is essentially their first argument dressed in new clothes: that the religious employer exemption discriminates against those plaintiffs that are organized as charities and not as houses of worship. Even if it is true that Catholicism is one of the religions that exercises its faith through charitable and educational works, that fact does not transform what might be an effect on Catholicism and those other religions into discrimination among religions.

Since the religious employer exemption is available to religious employers of all denominations, including

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[51] The Tenth Circuit's decision in *Weaver* is entirely consistent with this Court's decision because, at bottom, the issue present in that case was that Colorado's scholarship statute took a similar type of religious organization – in that case, religious schools – and treated them differently based on whether they were merely sectarian or "pervasively sectarian." 534 F.3d at 1250. Here, all religious charities are ineligible for the religious employer exemption.

the Archdiocese, it does not facially discriminate among religions, and strict scrutiny does not apply to plaintiffs' denominational discrimination claim. Instead, the Court must analyze the claim under the *Lemon* three-prong test. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987), quoting *Larson*, 456 U.S. at 252 ("[L]aws 'affording a uniform benefit to *all* religions' should be analyzed under *Lemon*," and "where a statute is neutral on its face and motivated by a permissible purpose of limiting governmental interference with the exercise of religion, [there is] no justification for applying strict scrutiny to a statute that passes the *Lemon* test.").

2. *The religious employer exemption is valid under Lemon.*

In *Lemon v. Kurtzman*, the Supreme Court created a three-prong Establishment Clause test based on factors that it "gleaned from [its prior] cases." 403 U.S. at 612. The first prong provides that "the statute must have a secular legislative purpose." *Id.* The second prong requires that the statute's "principal or primary effect must be one that neither advances nor inhibits religion." *Id.* And the third prong states that "the statute must not foster 'an excessive government entanglement with religion.'" *Id.* at 613, quoting Walz, 397 U.S. at 674. The religious employer exemption to the contraceptive mandate satisfies each prong.

The religious employer exemption has a secular legislative purpose even though it explicitly refers to religion. "*Lemon's* 'purpose' requirement aims at preventing the relevant governmental decisionmaker . . . from abandoning neutrality and

acting with the intent of promoting a particular point of view in religious matters." *Amos*, 483 U.S. at 335. It does not require a law's purpose "be unrelated to religion," *id.*, or "that the government show a callous indifference to religious groups." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). Instead, "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to . . . carry out their religious missions." *Amos*, 483 U.S. at 329, 335 (finding that section 702 of the Civil Rights Act of 1964, which "exempts religious organizations from Title VII's prohibition against discrimination in employment on the basis of religion," had a secular purpose under *Lemon*'s first prong).

Here, the religious employer exemption is meant to alleviate the burden imposed on religious employers so that they may "carry out their religious mission." As discussed above, there is no indication that defendants created the religious employer exemption in an effort to disfavor any particular religion; the religious employer exemption is available to all houses of worship, religious sects, and integrated auxiliaries that qualify under the tax code regardless of their religious denomination. *See* 26 U.S.C. § 6033(a)(3)(A)(i), (iii); 45 C.F.R. § 147.131(a). Thus, the religious employer exemption satisfies *Lemon*'s first prong. *See Hernandez*, 490 U.S. at 696 (finding that section 170 of the IRC had a secular purpose because it was not "born of animus to religion in general or Scientology in particular").

It also satisfies *Lemon*'s second prong. "For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced

religion through its own activities and influence," not simply that the law puts religious organizations in a position where they are now better able to advance their own purposes. *Amos*, 483 U.S. at 336–37 (finding that, although religious employers were better able to promote their religion if they could discriminate based on religion with respect to their employees, the law's primary effect neither advanced nor inhibited religion because the government took no action to do so). Additionally, "a statute primarily having a secular effect does not violate the Establishment Clause merely because it 'happens to coincide or harmonize with the tenets of some or all religions.'" *Hernandez*, 490 U.S. at 696, quoting *McGowan v. Maryland*, 366 U.S. 420, 442 (1961).

Here, the religious employer exemption has a principal or primary effect that neither advances nor inhibits religion. Although it relieves certain religious employers of the obligation to provide their employees with access to coverage for contraceptive services, and thus arguably aids their ability to advance a religious purpose, it is the religious employer that actually invokes the exemption and takes the steps towards fulfilling its religious goal. *See Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993) (allowing a State to provide a sign language interpreter to a deaf student attending a Catholic school because, even though the interpreter aided religious instruction, the fact that the IDEA made an interpreter available to all students regardless of what school they attend meant that the interpreter's presence in a sectarian school was the "result of the private decision of individual parents" and could not "be attributed to state decisionmaking"). Moreover, the limited scope of the

religious employer exemption and the government's implementation of an accommodation that will enable employees of many religious organizations to obtain coverage for contraceptive services demonstrate that the government has not taken steps to promote religious views.

Finally, the religious employer exemption satisfies *Lemon*'s third prong because it does not result in unlawful entanglement. "Interaction between church and state is inevitable;" therefore an "[e]ntanglement must be excessive before it runs afoul of the Establishment Clause." *Agostini v. Felton*, 521 U.S. 203, 233 (1997). Here, the exemption does not entail any sort of continuing or invasive relationship between the government and a religious employer, such as where the government investigates a party's religious belief to determine if it is "sufficiently religious." *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1342–43 (D.C. Cir. 2002). Eligibility for the religious employer exemption is based solely on the organizational structure of a party and is determined through reliance on IRC section 6033(a)(3)(A)(i) or (iii). *See* 45 C.F.R. § 147.131(a).

The religious employer exemption also does not create an ongoing or problematic relationship between church and state because, once an employer qualifies for the exemption, the matter is finished, and there is no need for any monitoring of that organization. *Cf. Agostini*, 521 U.S. at 233–34 (finding that, despite the ongoing relationship between church and state, there was no excessive entanglement problem with Title I's provision of funds to inner-city private schools); *Hernandez*, 490 U.S. at 696–97 (explaining that "routine regulatory

interaction which involves no inquiries into religious doctrine, no delegation of state power to a religious body, and no detailed monitoring . . . between secular and religious bodies, does not of itself violate the nonentanglement command") (citations and internal quotation marks omitted). So there is no basis to find that the religious employer exemption fosters excessive entanglement between the government and religion, and defendants are therefore entitled to summary judgment on plaintiffs' denominational discrimination claim in Count V.

B. Plaintiffs do not have standing to argue that the IRS's fourteen-factor test violates the Establishment Clause.

Plaintiffs claim that the religious employer exemption violates the Establishment Clause because it defines a "religious employer" by reference to section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code, which the Internal Revenue Service ("IRS") sometimes implements through reference to a nonexhaustive list of fourteen factors when determining whether the applicant organization is a house of worship or other qualifying organization. Pls.' Mot. at 37–38; Pls.' Opp. & Cross-Mot. at 39–41. According to plaintiffs, it is the probing nature of the fourteen-factor test that fosters excessive entanglement between the government and religious employers. Pls.' Mot. at 37–38; Pls.' Opp. & Cross-Mot. at 39–41. Defendants respond that, to the extent that plaintiffs' Establishment Clause claim rests on the constitutionality of a nonbinding, nonexhaustive list of factors found in the Internal Revenue Manual that has not yet been applied to any

plaintiff in this case, it is not ripe and must be dismissed. Defs.' Mem. at 39–40.

The Court agrees that plaintiffs' Establishment Clause challenge to the definition of religious employer is not justiciable at this time, either for lack of ripeness or lack of the cognizable injury necessary to give rise to standing. As discussed above, the injury prong of standing requires plaintiffs to establish that they have a concrete and personalized injury that is either actual or imminent. *Lujan*, 504 U.S. at 560. Here, plaintiffs' excessive entanglement claim rests on the notion that application of the fourteen-factor test could involve an invasive inquiry into their religious beliefs, giving rise to a constitutional injury. Pls.' Mot. at 37–38; Pls.' Opp. & Cross-Mot. at 39–41. But plaintiffs have not actually suffered that injury, and there is no imminent risk that they will. As defendants note, all plaintiffs in this case have matter-of-factly self-identified as being eligible or not eligible for the religious employer exemption.[52] Aff. of Archdiocese

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[52] The Court also finds it telling that plaintiffs have not previously challenged the fourteen-factor test as it underlies 26 U.S.C. § 6033, which excuses certain nonprofit religious employers from the requirement to file a tax return. At the motions hearing, plaintiffs claimed that there has been no such challenge in the past because the consequences of not being eligible under section 6033(a)(1)(A)(i), (iii) were not as severe as they are when that section is used to determine whether an organization is exempt from the contraceptive mandate. *See* Mot. Hr'g Tr. 89–91. Although that may be true from plaintiffs' point of view, it has no bearing on plaintiffs' excessive entanglement claim because, if the fourteen factors are unconstitutionally intrusive, they would be unconstitutionally intrusive regardless of whether the result was being exempt

¶ 18; Aff. of CCA ¶ 6; Aff. of ACHS ¶ 6; Aff. of Don Bosco ¶ 6; Aff. of Mary of Nazareth ¶ 6; Aff. of Catholic Charities ¶ 6; Aff. of Victory Housing ¶ 6; Aff. of CIC ¶ 6; Aff. of CUA ¶ 6; Aff. of TAC ¶ 6. The government does not dispute any of those assertions.

Plaintiffs point out that the government or an individual may someday bring an action challenging their self-identification in which the fourteen-factor test might be applied. But this is a highly speculative proposition. Plaintiffs would have to change their minds and claim that they qualify for the religious employer exemption; the government or a private party would have to disagree; and the government or the court would have to choose to apply the fourteen-factor test to resolve the dispute, instead of relying upon case law interpreting the statute or the plain language of the statute itself.

Plaintiffs have presented no grounds to believe that this chain of events would unfold. First, it is difficult to imagine that plaintiffs do not already know whether or not they are an organization listed in section 6033(a)(1)(A)(i), (iii) because they need to know this information to determine whether they are required to file a tax return despite their tax exempt status. Second, it is easily determined, and all plaintiffs in this case readily admit, that they are charitable organizations, not houses of worship, and that they are separately incorporated from the Roman Catholic Church, *see supra* section V.A., so it is unlikely that the government or any court would need to invoke the fourteen-factor test or expend any

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from a tax filing or being exempt from the contraceptive mandate.

effort whatsoever examining their religious beliefs. Third, plaintiffs have already self-identified as qualifying or not qualifying, and the only plaintiff that has self-identified as qualifying for the religious employer exemption at this point is the Archdiocese, which is undisputedly a church within the plain meaning of the exemption. *See* Aff. of Archdiocese ¶ 18. Since plaintiffs have not suffered an injury-in-fact and this claim is not ripe, they lack standing to bring their excessive entanglement challenge to the fourteen-factor test.[53] The Court will therefore dismiss the excessive entanglement challenge in Count V.

VI. Defendants are entitled to summary judgment on plaintiffs' Internal Church Governance claim in Count VI.

Plaintiffs argue that the contraceptive mandate violates both the Free Exercise Clause and the Establishment Clause of the First Amendment because it interferes with the internal governance of the Roman Catholic Church and its religious affiliates. Compl. ¶¶ 297–312; *see also* Pls.' Mot. at 38–40. It is true that the Supreme Court has recognized that the religion clauses of the First Amendment provide special protection to a religious organization's right to internally govern itself without interference from the government, *see, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012), but the

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[53] Because plaintiffs cannot satisfy the injury-in-fact requirement, there is no need for the Court to address the causation and redressability prongs of standing. *See Lujan*, 504 U.S. at 560–61.

operation of the exemption and the accommodation does not violate that principle.

Plaintiffs claim that the religious employer exemption to the mandate essentially divides the Catholic Church into two parts – a religious wing that is eligible for the exemption and a charitable and educational wing that is not. They say that this limits the Church's ability to supervise its religious affiliates to ensure that they are complying with its teachings, but they are referring to just one particular aspect of that relationship: the fact that a number of plaintiffs insure their employees through the Archdiocese's self-insured health plan. Pls.' Mot. at 39–40. Specifically, plaintiffs voice the concern that the contraceptive mandate disrupts this internal insurance arrangement by putting the Archdiocese in a position where it must choose between continuing to sponsor its affiliates' plans, which must include contraceptive services coverage, or dropping those affiliates from the plan, subjecting the affiliates to fines unless they contract for the objectionable coverage on their own. But that is not how the regulations operate, and the Archdiocese is not in a position where it must make that decision. So, assuming that this count even alleges an injury-in-fact, defendants are entitled to summary judgment on Count VI.

The government has assured the Court that it has no power to require the third-party administrator of the Archdiocese's plan to provide contraceptive services on behalf of the church plan plaintiffs, and there is no indication that the Archdiocese's third-party administrator will assume that responsibility

voluntarily. As defendants stated in response to the Court's questions on this issue:

> The third party administrator (TPA) of the Archdiocese's self-insured church plan is not bound to provide or arrange for payments under section [2590.715–2713A(b)(2)]. As explained in defendants' earlier briefing, the government's authority to require TPAs to make such payments derives from ERISA, and church plans are specifically excluded from regulation under ERISA. Self-certification remains a requirement that the non-Archdiocese plaintiffs must satisfy if they wish to be considered "eligible organization[s]" and thereby comply with the regulations, but the regulations do not require a self-insured church plan or any [third-party administrator] of the plan to make payments for contraceptive services for plan participants and beneficiaries.

Defs.' Resp. to Ct. Order at 2–3 (second alternation in original) (citations omitted); *see also supra* section I.C. The government also concedes that, regardless of whether or not the Archdiocese's third-party administrator provides the coverage, the church plan plaintiffs "are *not* required to identify another [third-party administrator] to perform that function," and the Archdiocese's third-party administrator may still remain in its position:

> QUESTION BY THE COURT: If the church plan plaintiffs "submit the self-certification to the third-party administrator of the Archdiocese plan, and the third-party administrator does not agree to provide or arrange for payment for contraceptive services for [those] plaintiffs'

> employees, may that third-party administrator remain in its contractual relationship with the Archdiocese as the administrator of the church plan? Are the self-certifying organizations permitted to continue to provide coverage to their employees through that plan? May the third-party administrator continue to serve as the third-party administrator for the self-certifying organization?"
>
> DEFENDANTS: "Yes to all."

Defs.' Resp. to Ct. Order at 3. Thus, the regulations do not interfere with the Archdiocese's management of its plan according to the tenets of its faith or its decision to invite its affiliates to offer health insurance through the same plan.

VII. Defendants are entitled to summary judgment on plaintiffs' APA contrary to law claim in Count VII.[54]

Plaintiffs argue that the contraceptive mandate violates the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*[55] Compl. ¶¶ 313–26; *see also* Pls.' Mot. at 40–41. They direct this Court's attention to the Weldon Amendment and the ACA's 42 U.S.C. § 18118(c), and argue that the contraceptive mandate is contrary to those laws because it includes coverage

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[54] "Plaintiffs" refers only to Catholic University and Thomas Aquinas College. The Archdiocese is completely exempt and it is entirely speculative that the church plan plaintiffs' employees will actually receive coverage for the objected-to contraceptive services.

[55] The APA directs that this Court "hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law." 5 U.S.C. § 706(2)(A).

for emergency contraceptives, which – according to plaintiffs – are a form of abortion. Pls.' Mot. at 40. The burden is on plaintiffs to show that the law they challenge is not in accordance with the law, *Abington Crest Nursing & Rehab. Ctr. v. Sebelius*, 575 F.3d 717, 722 (D.C. Cir. 2009); *City of Olmsted Falls v. FAA*, 292 F.3d 261, 271 (D.C. Cir. 2002), and plaintiffs have not met that burden in this case.

A. The contraceptive mandate is consistent with the Weldon Amendment.

The Weldon Amendment is an appropriations rider that restricts a government agency's funding if that agency "subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions." Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, div. F, tit. V, § 507(d)(1), 125 Stat. 786, 1111. Plaintiffs argue that the contraceptive mandate discriminates against plaintiffs based on their refusal to cover emergency contraceptives, such as "Plan B" or "ella," which they contend induce abortions. Pls.' Mot. at 40. Defendants argue, based on the FDA's long-standing view, that emergency contraceptives act as contraceptives, not abortions, and they are therefore not within the prohibition of the Weldon Amendment. Defs.' Mem. at 42–44. So, the parties' dispute on this issue boils down to whether the word "abortion," used but not defined by the Weldon Amendment, includes emergency contraceptives.

But the Court does not need to wade into this blend of science and theology and decide whether emergency contraceptives are "abortion-inducing"

products or simply contraceptives in order to find that the mandate is consistent with the Weldon Amendment. Although both parties agree that plaintiffs are among the healthcare entities to which the Weldon Amendment refers, there is no indication that the contraceptive mandate discriminates against them because they do not provide, pay for, provide coverage of, or refer for abortions. It is undisputed that the Archdiocese is completely exempt from the contraceptive services coverage requirement and that all other plaintiffs are eligible for the accommodation. Aff. of Archdiocese ¶ 18; Compl. ¶ 10. Once an eligible organization seeks the accommodation, it no longer has any responsibility to "provide, pay for, provide coverage of, or refer" for *any* contraceptive services, let alone emergency contraceptives. 29 C.F.R. § 2590.715-2713A(a), (b), (c). That responsibility shifts to a willing third-party administrator or group insurer, and any penalty the eligible organization faces for failing to provide for the required services evaporates. *Id.* With the elimination of the penalty for failing to provide coverage for contraceptive services, the accommodation eliminates any potential discrimination against plaintiffs for exercising their religious views and makes it irrelevant whether the word "abortion," as used in the Weldon Amendment, includes emergency contraceptives or not. Plaintiffs therefore fail to meet their burden to show that the contraceptive mandate – as applied to them – is contrary to law.

B. The contraceptive mandate is not contrary to 42 U.S.C. § 18118(c).

Plaintiffs also argue that the contraceptive mandate is contrary to section 18118(c) of the ACA, which states that no provision in title 42 "shall be construed to prohibit an institution of higher education . . . from offering a student health insurance plan." 42 U.S.C. § 18118(c); *see also* Compl. ¶ 323; Pls.' Mot. at 40. Plaintiffs contend that the contraceptive mandate contravenes this provision because it effectively prohibits Catholic University from offering a student health insurance plan since the University's religious beliefs prohibit it from facilitating access to contraceptive services coverage through that healthcare plan.[56] Compl. ¶ 323; *see also* Pls.' Mot. at 40–41. The Court disagrees.

First, plaintiffs make no attempt to meet their burden to establish that the contraceptive mandate is contrary to section 18118(c). In their motion for a preliminary injunction, they summarily state that the contraceptive mandate "has the effect of prohibiting CUA from offering a student health-insurance plan, since such plan would have to provide access to coverage to which CUA objects based on its sincerely-held religious beliefs," Pls.' Mot. at 41, and they briefly repeat that notion in their reply brief. Pls.' Reply at 23. They do not mention section 18118(c) in their combined opposition and cross-motion for summary judgment, *see* Pls.' Opp. & Cross-Mot. at 43–44, so the Court could consider that claim to be waived.

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[56] It is only Catholic University, then, that has standing to press this claim.

In any event, the contraceptive mandate does not "prohibit" Catholic University from covering its students or "force" it to provide a student healthcare plan that includes coverage for contraceptive services: the accommodation effectively severs the tie between the University's healthcare plan and the provision of that coverage once the self-certification form is filed. *See supra* section I.A.

Moreover – even if the provision of contraceptive services was not completely severed from Catholic University's student health insurance plan – the Court would still conclude that the contraceptive mandate is consistent with section 18118(c). As defendants explain – and plaintiffs fail to refute – section 18118(c) was promulgated in order to render certain requirements of the Public Health Services Act and the ACA inapplicable to student health insurance programs, such as provisions that would allow students to remain indefinitely on the school's healthcare plan (even after graduation) and provisions that would allow nonstudents to enroll, because application of those requirements to student health insurance plans would make the provision of that plan economically unfeasible. Defs.' Mem. at 43–44. By contrast, the contraceptive mandate, as modified by the accommodation, does not have the direct effect of making it impossible for an organization of higher education to provide a student health insurance plan. With this argument left uncontested, the Court finds that the contraceptive mandate is consistent with 42 U.S.C. § 18118(c). Defendants are therefore entitled to summary judgment on Count VII.

VIII. Plaintiffs do not have standing to bring the APA erroneous interpretation claim in Count VIII.[57]

Plaintiffs contend that defendants violated the APA when they erroneously interpreted the religious employer exemption to apply on an employer-by-employer basis, rather than a plan-by-plan basis. Compl. ¶¶ 327–39; *see also* Pls.' Mot. at 41–43. They challenge the statement in the preamble to the new accommodation regulations that states: "[t]he final regulations continue to provide that the availability of the exemption or an accommodation be determined on an employer-by-employer basis, which the Departments continue to believe best balances the interests of religious employers and eligible organizations and those of employees and their dependents." 78 Fed. Reg. at 39886.

Plaintiffs claim they are injured by this interpretation because, if the exemption applied on a plan-by-plan basis, all of the church plan plaintiffs would be exempt along with the Archdiocese that sponsors their plan, and they would not be required to engage in actions that they claim would facilitate access to contraceptive services in violation of their religious beliefs. *See* Pls.' Mot. at 41–43. But, as the

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[57] In this section, "plaintiffs" refers only to the church plan plaintiffs. Catholic University and Thomas Aquinas College do not have standing to challenge the government's interpretation of the religious employer exemption as applying on an employer-by-employer basis because they do not participate in a multi-employer health plan and therefore are not injured by that interpretation. The Archdiocese also does not have standing to bring this claim because it is exempt under the contraceptive mandate.

Court explained above, given the manner that the accommodation operates, the church plan plaintiffs are not required to perform any acts that would facilitate access to those services. Once the church plan plaintiffs certify their opposition to contraceptive coverage to the Archdiocese's third-party administrator, their plans will be in compliance with the mandate. Defs.' Resp. to Ct. Order at 3. There will be no obligation placed on the third-party administrator that can be enforced under ERISA, and the church plan plaintiffs will not have to contract with another. *Id.* As a result, the church plan plaintiffs attain relief from the contraceptive mandate via the accommodation, and they have not shown that they are injured by defendants' interpretation of the religious employer exemption. Without a cognizable injury that is fairly traceable to defendants' conduct, the church plan plaintiffs lack standing to bring their APA claim. *Lujan*, 504 U.S. at 560–61. The Court will therefore dismiss Count VIII.[58]

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[58] The Court also notes that, in this claim, plaintiffs are taking issue with a statement of agency policy or intent that is contained in the preamble to the accommodation regulations, but not a regulation itself, and plaintiffs have not identified any situation in which the interpretation has actually been applied or enforced to any of their detriment. While the government has explained what it meant to accomplish by reading its regulations in this matter, it is unclear to the Court how this will operate in practice, particularly since the obligation to offer employees a healthcare insurance plan (the "employer mandate") is imposed on employers, but the obligation to include coverage for contraceptive services (the "contraceptive mandate") is imposed by law on the plans.

CONCLUSION

For the reasons stated above, the Court will grant defendants' motion for summary judgment with respect to Catholic University's RFRA claim in Count I, and all of the plaintiffs' Free Exercise claims in Count II, compelled speech claims in Count III, denominational preference claims in Count V, internal church governance claims in Count VI, and APA contrary to law claims in Count VII, and the Court will therefore deny plaintiffs' cross-motion for summary judgment with respect to those counts. The Court will grant defendants' motion to dismiss the church plan plaintiffs' RFRA claims in Count I, and all of the plaintiffs' Establishment Clause challenges to the IRS factors in Count V and APA erroneous interpretation claims in Count VIII for lack of jurisdiction. Plaintiffs' cross-motion for summary judgment on those counts is therefore moot. Finally, the Court will grant Thomas Aquinas College's cross-motion for summary judgment on its RFRA claim in Count I and all of the plaintiffs' cross-motions for summary judgment on their Free Speech claims asserted in Count IV, and it will therefore deny defendants' motion for summary judgment with respect to those counts. A separate order will issue.

AMY BERMAN JACKSON
United States District
Judge

DATE: December 20, 2013

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5368 **September Term, 2013**

1:13-cv-01261-EGS

Filed On: December 31, 2013

Priests For Life, et al.,
Appellants

v.

United States Department of Health and Human Services, et al.,
Appellees

No. 13-5371

1:13-cv-01441-ABJ

Roman Catholic Archbishop of Washington, et al.,
Appellants

Thomas Aquinas College,
Appellee

v.

Kathleen Sebelius, et al.,
Appellees

BEFORE: Henderson, Tatel*, and Brown, Circuit Judges

ORDER

Upon consideration of the emergency motion for injunction pending appeal in No. 13-5368, the response, the reply, and the Rule 28(j) letters; the emergency motion for injunction pending appeal in No. 13-5371, the response, the reply, and the Rule 28(j) letters, it is

ORDERED that the motions for injunction pending appeal be granted. Appellants have satisfied the requirements for an injunction pending appeal. *See Winter v. Natural Res. Def. Council*, 555 U.S. 7, 129 S. Ct. 365, 374 (2008); *D.C. Circuit Handbook of Practice and Internal Procedures* 33 (2013). Appellees are enjoined from enforcing against appellants the contraceptive services requirements imposed by 42 U.S.C. § 300gg-13(a)(4) and related regulations pending further order of the court. It is

FURTHER ORDERED, on the court's own motion, that these cases be consolidated. It is

FURTHER ORDERED that appellants in these consolidated cases show cause by January 14, 2014, why they should not be required to file one joint opening brief limited to 14,000 words and one joint reply brief limited to 7,000 words. The parties are reminded that the court looks with extreme disfavor on repetitious submissions and will, where appropriate, require a joint brief of aligned parties with total words not to exceed the standard allotment for a single brief. Whether the parties are aligned or

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* Judge Tatel would deny the emergency motions for injunction pending appeal for the reasons in the attached statement.

have disparate interests, they must provide detailed justifications for any request to file separate briefs or to exceed in the aggregate the standard word allotment. Requests to exceed the standard word allotment must specify the word allotment necessary for each issue.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Timothy A. Ralls
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5368 **September Term, 2013**

TATEL, *Circuit Judge*: Appellants challenge a section of the Affordable Care Act that requires certain religious organizations to "self certify" their religious objections to the provision of contraceptive services in order to escape the Act's requirement that they provide such services to their employees. Because I believe that Appellants are unlikely to prevail on their claim that the challenged provision imposes a "substantial burden" under the Religious Freedom Restoration Act (RFRA), I would deny their application for an injunction pending appeal. *See Little Sisters of the Poor Home for the Aged v. Sebelius*, No. 13-1540 (10th Cir. Dec. 31, 2013) (denying injunction pending appeal); *University of Notre Dame v. Sebelius*, No. 13-1540 (7th Cir. Dec. 30, 2013) (same). Simply put, far from imposing a "substantial burden" on Appellants' religious freedom, the challenged provision allows Appellants to avoid having to do something that would substantially burden their religious freedom.

Of course, if Appellants were correct that the challenged provision requires them to engage in acts that "affirmatively authorize" and "trigger[]" contraceptive coverage, PFL Mot. 2, 7, then I would agree that we should grant an injunction pending appeal. 42 U.S.C § 2000bb-1(a)-(b); *Gilardi v. Department of Health and Human Services*, No. 13-5069, slip op. at 21–23 (D.C. Cir. Nov. 1, 2013). But that is not how the challenged provision operates. As

the government points out, the Affordable Care Act requires employers and insurers to provide health plans that include contraceptive coverage. *See* 29 C.F.R. 2590.715–2713(a)(1)(iv); PFL Opp. 3–5. Because Congress has imposed an independent obligation on insurers to provide contraceptive coverage to Appellants' employees, those employees will receive contraceptive coverage from their insurers *even if* Appellants self-certify—but not because Appellants self-certify. Insofar as Appellants argue that they are burdened by authorizing their third-party administrator to provide contraceptive coverage, the government has conceded that the contraceptive mandate cannot be enforced against third-party administrators of church plans, and Appellants have provided no reason for us to believe that the Catholic Archdiocese of Washington's plan, Appellants' third-party administrator, will provide such coverage. *See Roman Catholic Archbishop of Washington v. Sebelius*, No. 13-1441, slip op. at 46–51 (D.D.C. Dec. 20, 2013); *see also Little Sisters of the Poor Home for the Aged* at 2–3. In other words, it was Congress that "authorized" insurers to provide contraceptive coverage to Appellants' employees—services those employees will receive regardless of whether Appellants self-certify.

Appellants also argue that they are burdened simply by participating in a "scheme" in which contraceptive services are provided. *See* PFL Reply 4; Archbishop Reply 6. Although we must accept Appellants' assertion that the scheme itself violates their religious beliefs, we need not accept their legal conclusion that their purported involvement in that scheme qualifies as a substantial burden under RFRA. *Cf. Kaemmerling v. Lappin*, 553 F.3d 669,

679 (D.C. Cir. 2008) ("Accepting as true the factual allegations that Kaemmerling's beliefs are sincere and of a religious nature—but not the legal conclusion, cast as a factual allegation, that his religious exercise is substantially burdened—we conclude that Kaemmerling does not allege facts sufficient to state a substantial burden on his religious exercise."). Appellants' participation is limited to complying with an administrative procedure that establishes that they are, in effect, exempt from the very requirements they find offensive. *See id.* at 678 ("An inconsequential or de minimis burden on religious practice does not rise to [the level of a substantial burden under RFRA], nor does a burden on activity unimportant to the adherent's religious scheme."). At bottom, then, Appellants' religious objections are to the government's independent actions in mandating contraceptive coverage, not to any action that the government has required Appellants themselves to take. But Appellants have no right to "require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Bowen v. Roy*, 476 U.S. 693, 699 (1986). Religious organizations are required to file many forms with the government, such as applications for tax exemptions, even though they may have religious objections to a whole host of government policies and programs. Nothing in RFRA empowers such organizations to leverage their own minimal interaction with the government to force the government to act in conformance with their religious beliefs—however sincerely held.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5368 **September Term, 2013**

1:13-cv-01441-ABJ

1:13-cv-01261-EGS

Filed On: March 14, 2014 [1484058]

Priests For Life, et al.,

Appellants

v.

United States Department of Health and Human Services, et al.,

Appellees

Consolidated with 13-5371, 14-5021

O R D E R

It is **ORDERED**, on the court's own motion, that this case be scheduled for oral argument on May 13, 2014, at 9:30 A.M., before Circuit Judges Brown, Griffith, and Millett.

The time and date of oral argument will not change absent further order of the Court.

A separate order will be issued regarding the allocation of time for argument.

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Michael C. McGrail

Deputy Clerk

The following forms and notices are available on the Court's website:

Memorandum to Counsel Concerning Cases Set for Oral Argument (Form 71)

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5368 **September Term, 2013**

1:13-cv-01441-ABJ
1:13-cv-01261-EGS

Filed On: March 25, 2014
[1485206]

Priests For Life, et al.,

Appellants

v.

United States Department of Health and Human Services, et al.,

Appellees

Consolidated with 13-5371, 14-5021

ORDER

It is **ORDERED**, on the court's own motion, that these cases are removed from the court's May 13, 2014 oral argument calendar and are rescheduled for oral argument on May 8, 2014 at 9:30 a.m. before Circuit Judges Rogers, Pillard, and Wilkins.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

APPENDIX F

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed: May 20, 2015

No. 13-5368

PRIESTS FOR LIFE, ET AL.,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,
APPELLEES

Consolidated with 13-5371, 14-5021

Appeals from the United States District Court for the District of Columbia
(No. 1:13-cv-01261)
(No. 1:13-cv-01441)

On Petition for Rehearing En Banc

BEFORE: GARLAND, *Chief Judge*; HENDERSON, ROGERS, TATEL, BROWN**, GRIFFITH, KAVANAUGH**, SRINIVASAN*, MILLETT*, PILLARD, AND WILKINS, *Circuit Judges*.

ORDER

Appellants/cross-appellees' joint petition for rehearing en banc and the response thereto were circulated to the full court, and a vote was requested. Thereafter, a majority of the judges eligible to participate did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Deputy Clerk

* Circuit Judges Srinivasan and Millett did not participate in this matter.

** Circuit Judges Brown and Kavanaugh would grant the petition.

A statement by Circuit Judge Pillard, joined by Circuit Judges Rogers and Wilkins, concurring in the denial of rehearing en banc, is attached.

A statement by Circuit Judge Brown, joined by Circuit Judge Henderson, dissenting from the denial of rehearing en banc, is attached.

A statement by Circuit Judge Kavanaugh, dissenting from the denial of rehearing en banc, is attached.

PILLARD, *Circuit Judge*, joined by ROGERS and WILKINS, *Circuit Judges*, concurring in the denial of

rehearing en banc: A majority of the court has voted to deny the petition for rehearing en banc in this case. In two thoughtful opinions, Judge Kavanaugh, and Judge Brown joined by Judge Henderson, dissent from that denial. The panel's opinion speaks at length to the issues they take up. The panel members write further only to underscore why our court's approach accords with the Supreme Court's decision in *Burwell v. Hobby Lobby Stores*, Inc., 134 S. Ct. 2751 (2014).

The dissenters and we agree that the Religious Freedom Restoration Act provides robust protection for religious liberty—without regard to whether others might view an adherent's beliefs or practices as irrational, trivial, or wrong. Nothing in our opinion should be seen to detract from that vital guarantee. Where we part ways is that the dissenters perceive in *Hobby Lobby* a potentially sweeping, new RFRA prerogative for religious adherents to make substantial-burden claims based on sincere but erroneous assertions about how federal law works. They believe we ignored that prerogative here. The dissenters read more into the Supreme Court's decision than it supports. *Hobby Lobby* embraced adherents' claim about the religious meaning of the undisputed operation of a federal regulation; this case involves a claim that courts must credit religious adherents' incorrect assertions about how a different federal regulation operates. Because *Hobby Lobby* did not address that distinct issue, we see no conflict.

The Court in *Hobby Lobby* invalidated the requirement that closely-held, for-profit businesses with religious objections to contraception nonetheless

must buy health-insurance coverage for their employees that pays for contraception, or else face taxes or penalties. 134 S. Ct. at 2759. No opt out was available to those businesses. The parties in *Hobby Lobby* did not dispute what the law required, nor its practical effects: All agreed that the Affordable Care Act regulations mandated that employer-sponsored health plans include contraception, and that as a result plaintiffs' employees got access to contraception paid for, in part, by their employers. *See id.* at 2762. What the parties in *Hobby Lobby* contested were the moral and religious implications of the businesses' conceded role. The plaintiff business owners believed that "providing the coverage demanded . . . is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage." *Id.* at 2778. The government disagreed, contending that employees' intervening choices whether to use contraception broke the chain of moral culpability, and hence the law did not substantially burden the businesses' religious exercise. *Id.* at 2777-78.

In rejecting the government's position in *Hobby Lobby*, the Supreme Court emphasized that courts may not second-guess religious beliefs about the wrongfulness of facilitating another person's immoral act. *Id.* at 2778. RFRA forbids courts from "provid[ing] a binding national answer to . . . religious and philosophical question[s]" or "tell[ing] the plaintiffs that their beliefs are flawed." *Id.*; *see also id.* at 2779 ("[I]t is not for us to say that [plaintiffs'] religious beliefs are mistaken or insubstantial. Instead, our 'narrow function in this context is to determine' whether the line drawn

reflects 'an honest conviction.'" (alteration marks omitted) (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981))). The context makes clear that the Court's discussion of facilitation simply restates the basic tenet of the religious freedom cases that judges may not question the correctness of a plaintiff's religious beliefs.

That reasoning is inapplicable here. The dispute between the government and the Plaintiffs in this case, unlike in *Hobby Lobby*, is not about religious implications of acknowledged—but perhaps attenuated—support for contraceptive use; the parties disagree here about how the law functions, and therefore whether there is any causal connection at all between employers' opt-out notice and employees' access to contraception. Plaintiffs challenge the accommodation, not available in *Hobby Lobby*, based on their assertion that what causes their employees to receive contraceptive coverage is their compliance with the accommodation's precondition that they give notice of their sincere religious objections to such coverage. As Plaintiffs characterize it, their act of excusing themselves from legal liability for not providing contraceptive coverage is what made such coverage available to employees, and hence violated their Catholic faith.

We held that Plaintiffs miscast the accommodation. The regulation allows Plaintiffs to continue to do just what they did before the ACA: notify their insurers of their sincere religious objection to contraception, and arrange for contraception to be excluded from the health insurance coverage they provide.[88] As before,

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[88] Judge Kavanaugh is perplexed as to why, if not for an impermissible reason, the government requires any form at all.

insurers may sell plans that exclude contraception to their religious-nonprofit customers. The difference is that now the ACA and its regulations require that contraceptive coverage be provided to all insured women. In the case of women who get their insurance coverage through an accommodated employer, the law requires insurers to offer the women contraception under a separate plan—completely segregated from the objecting employer's plan and its payments.

Kavanaugh Dissent at 12-13 & n.5. The form is far from "meaningless," *id.*, because it acts as "the written equivalent of raising a hand in response to the government's query as to which religious organizations want to opt out," and extricates those objectors in a manner consistent with the contraceptive coverage requirement. *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 250 (D.C. Cir. 2014). Only once an insurer becomes aware of the employer's religious objection can it take the steps needed to effectuate the opt out, such as: exclude contraceptive coverage from the employer's group health plan, prevent the employer's payment from funding contraception, notify the beneficiaries that the employer plays no role in administering or funding contraceptive coverage, and arrange for separate mailings and accounting. *Id.* (citing regulatory provisions). Judge Kavanaugh would hold that including the insurer's identity in the form is unnecessarily restrictive of religious exercise because, extending our metaphor, he says it requires the objecting employer "both to raise its hand *and* to point to its insurer." Kavanaugh Dissent at 24 n.11. But it is more apt to say that, if the employer opts to raise its hand where the insurer cannot see it (*i.e.* via the alternative notice delivered to the government rather than the insurer, *see* 45 C.F.R. § 147.131(c)(1); 29 C.F.R. § 2590.715-2713A(b)(1)(ii)), the government must be in a position promptly to communicate the religious objection to the insurer, or else the employer's insurance plan will continue to include contraceptive coverage. An insurer that is kept in the dark about an employer's religious objections cannot do what it must to honor the opt out.

The judges who urge us to rehear the case say that *Hobby Lobby* leaves no room for us to question Plaintiffs' characterization of how the challenged regulations operate, including their assertions that the regulations force Plaintiffs to facilitate the provision of contraception. As they read it, *Hobby Lobby* forbids a court deciding a claim under RFRA to assess whether a plaintiff's belief about what a law requires him to do is correct. *See, e.g.*, Kavanaugh Dissent at 8-11; Brown Dissent at 10-12. Both dissents argue that *Hobby Lobby*'s discussion of facilitation requires us simply to accept whatever beliefs a RFRA plaintiff avows—even erroneous beliefs about what a challenged regulation actually requires.

Neither the holding nor the reasoning of *Hobby Lobby* made that leap. RFRA understandably accorded Hobby Lobby Stores a victory in a contest over what *religious meaning* to ascribe to the Stores' payment for contraceptive coverage. That holding does not require us to credit Priests for Life's legally inaccurate assertions about the *operation of the regulation* they challenge. *See Univ. of Notre Dame v. Burwell*, No. 13-3853, slip op. at 11, 15 (7th Cir. May 19, 2015); *see also id.* at 34 (Hamilton, J., concurring). *But see id.* at 44-46 (Flaum, J., dissenting). Our panel opinion explains that it is the mandate on insurers that causes Plaintiffs' employees to receive contraceptive coverage, and not anything Plaintiffs are required to do in claiming their accommodation. The panel thus held that Plaintiffs suffered no substantial burden triggering RFRA strict scrutiny.

The dispute we resolved is legal, not religious. Under the ACA regulations, a woman who obtains

health insurance coverage through her employer is no more entitled to contraceptive coverage if her employer submits the disputed notice than if it does not. The ACA obligation to provide contraceptive coverage to all insured women does not depend on that notice. Nothing in RFRA requires that we accept Plaintiffs' assertions to the contrary.

RFRA protects religious exercise. In no respect do we, nor could we, question Plaintiffs' sincere beliefs about what their faith permits and forbids of them. But we can and must decide which party is right about how the law works. We concluded that the regulation challenged in this case does not, as a matter of law or fact, give Plaintiffs' conduct the contraception-facilitating effect of which they complain.

Indeed, it bears emphasis that the whole point of the challenged regulation is to scrupulously shield objecting religious nonprofits from any role in making contraception available to women. The accommodation is itself evidence of the fundamental commitment of this Nation to religious freedom that RFRA embodies. The regulation is, of course, properly subject to judicial scrutiny to verify that it comports with governing law, including *Hobby Lobby*. Because we conclude that it does, we believe that en banc review is not warranted in this case.

BROWN, *Circuit Judge*, with whom HENDERSON, *Circuit Judge*, joins, dissenting from the denial of rehearing en banc: The French say: *plus ça change et plus c'est la même chose. The more things change; the more they remain the same.* There was once a time when the church was the state and the church as the state embodied all hope of human well-being. R.W. SOUTHERN, WESTERN SOCIETY AND THE CHURCH IN THE MIDDLE AGES 23 (1970). To challenge the church was to undermine civilization. Thus, the imposition of orthodoxy was deemed necessary, and dissent, which amounted to heresy, was met with coercion and violence. *See* ST. THOMAS AQUINAS, SUMMA THEOLOGIÆ pt. II-II, q. 11, art. 3.

This history prompted John Locke to urge toleration and stress the necessity of distinguishing "the business of civil government from that of religion" and establishing clear boundaries between them. John Locke, *A Letter Concerning Toleration*, reprinted in 5 THE WORKS OF JOHN LOCKE 5, 9 (12th ed. 1824). The Framers went further, establishing not only a limited government, but recognizing the primacy of individual conscience and seeking the line between freedom and justice. Thus, the Bill of Rights "grew in soil which also produced a philosophy that . . . liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervision over men's affairs." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639–40 (1943). The federal government was given no authority over men's souls. For the Founders, the not-so-distant history of persecution engendered a fierce commitment to each individual's natural and inalienable right to believe according to his

"conviction and conscience" and to exercise his religion "as these may dictate." James Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted in 2 WRITINGS OF JAMES MADISON 183, 184 (G. Hunt ed. 1901). "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642.

Of course, the right to freely exercise one's religion is not—and was not intended to be—absolute. The Founders recognized state coercion would at times be necessary, with Madison himself stating "full and free exercise . . . according to the dictates of conscience" could be limited where "the preservation of equal liberty . . . and the existence of the [government] may be manifestly endangered." G. Hunt, *Madison and Religious Liberty*, 1 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION, H.R. Doc. No. 702, 57th Cong., 1st Sess., 163, 166–67 (1901). However, "[t]he essence of all that has been said and written on the subject is that only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

The soil of the eighteenth century has eroded and that fixed star grown surprisingly dim. We live in a time where progress is sought "through expanded and strengthened governmental controls." *Barnette*, 319 U.S. at 640. In a sense the government now fills the role formerly occupied by the church, embodying the hope of human well-being. For the government to

pursue the good and to solve society's problems, it must first identify that which is good and that which is problematic through subjective and value-laden judgments. *Cf.* Laurence H. Tribe, *Disentangling Symmetries: Speech, Association, Parenthood*, 28 PEPP. L. REV. 641, 651–53 (2001) (stating that when the government takes a side in a "direct clash of competing images of 'the good life,'" it "is making an intrinsically contestable statement about the rightness or wrongness" of ideals). Consequently, orthodoxy has been rehabilitated, and dissent from the government's determinations may be quelled through coercion—onerous fines or banishment from commerce and the public square.

Despite the parallels, we do not find ourselves full circle quite yet. Religious adherents may still seek refuge from unnecessary governmental coercion through the Religious Freedom Restoration Act ("RFRA"). When the federal government substantially burdens free exercise, it may do so only in pursuit of a compelling interest and even then must use the least restrictive means. 42 U.S.C. § 2000bb-1. Further, the conscience of the individual remains protected in that he must "answer to no man for the verity of his religious views." *United States v. Ballard*, 322 U.S. 78, 87 (1944). But, in our respectful view, the panel in this case failed to apply these protections. The panel conceded Plaintiffs sincerely "believe that the regulatory framework makes them complicit in the provision of contraception," Slip Op. at 27 (quoting *Mich. Catholic Conf. v. Burwell*, 755 F.3d 372, 385 (6th Cir. 2014), *vacated and remanded*, No. 14-701, 2015 WL 1879768, at *1 (U.S. Apr. 27, 2015)). That acknowledgement should end our inquiry into the

substance of their beliefs. Viewed objectively, Plaintiffs' belief that the acts the regulations compel them to perform would facilitate access to contraception in a manner that violates the teachings of their Church may "seem incredible, if not preposterous," to some people. *Ballard*, 322 U.S. at 87. However, this Court is neither qualified nor authorized to so scrutinize any religious belief. The panel trespassed into an area of inquiry Supreme Court precedent forecloses. It then proceeded to accept evidence that is insufficient under the rulings of the Supreme Court to find the purported compelling interest. For these reasons we believe this exceptionally important case is worthy of en banc review.

I

We begin by addressing the panel's opening observations and by making some of our own with the hopes of distinguishing between fact and fancy. First, this case is not about denying any woman access to contraception. A woman's right to obtain and use contraception was recognized long ago, and nothing about this case calls for the issue to be revisited. *See Griswold v. Connecticut*, 381 U.S. 479 (1965).

Second, this case is about the religious freedom of these religiously-affiliated organizations and not about the free exercise concerns of the plaintiffs in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). In that case, the Supreme Court found the Department of Health and Human Services' ("HHS") approach to religious nonprofits demonstrated there were less restrictive means available to deal with conscientious objectors among for-profit corporations. *Id.* at 2781–82. The Court expressly reserved

judgment on whether HHS's approach "complies with RFRA for purposes of all religious claims." *Id.* at 2782. While the government's approach to religious non-profits may—or may not—fully put to rest the *Hobby Lobby* plaintiffs' religious objections, that is irrelevant to our consideration of the religious objections put forth by Plaintiffs in this case. The present Plaintiffs are entitled to their own personal beliefs.

Third, this case is not "paradoxical" because Plaintiffs object to regulatory requirements the government intended as a religious accommodation. Slip Op. at 24 (quoting *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 557 (7th Cir. 2014), *vacated and remanded*, 135 S. Ct. 1528 (2015)). That the government's expressed intent in enacting the regulations at issue was to allay religious adherents' concerns about the contraception mandate is not determinative of the ultimate question of whether Plaintiffs were in fact accommodated. Where the government imposes a substantial burden on religious exercise and labels it an "accommodation," that burden is surely as distressing to adherents as it would be if imposed without such a designation. Therefore, heightened skepticism is not appropriate. We should look at Plaintiffs' claims as we would any RFRA claim. After all, in the substantial burden analysis, the government's motivations—no matter how benevolent—are irrelevant; we ask only whether the government's action operates to place "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981).

Fourth, this case is not one in which Plaintiffs' "only harm . . . is that they sincerely feel aggrieved by their inability to prevent what other people would do to fulfill regulatory objectives after they opt out." Slip Op. at 24. The regulations compel Plaintiffs to take actions they believe would amount to "impermissibly facilitating access to abortion-inducing products, contraceptives, and sterilization" in violation of their religious tenets. Pet. for Reh'g En Banc at 1. Make no mistake: the harm Plaintiffs complain of—and the harm this Court therefore is called to assess—is from their inability to conform *their own* actions and inactions to their religious beliefs without facing massive penalties from the government.

II

The panel's substantial burden analysis is inconsistent with the precedent of the Supreme Court and this Court, which identifies both permissible and impermissible lines of inquiry in the substantial burden analysis of a RFRA claim.

A

As we have recognized, whether a burden is "substantial" for purposes of RFRA is a question of law for the court to answer, not a "question[ ] of fact, proven by the credibility of the claimant." *Mahoney v. Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011). Relying on longstanding precedent, the Supreme Court recently described permissible lines of inquiry for a court to pursue in determining whether an adherent's religious exercise has been substantially burdened, both in *Hobby Lobby* and in *Holt v. Hobbs*, 135 S. Ct. 853 (2015), a case involving the Religious Land Use

and Institutionalized Persons Act of 2000, 42 U.S.C. §2000cc et seq, (RLUIPA).[1] The plaintiff bears 'the initial burden of proving [the law or regulation at issue] implicates his religious exercise." *Holt*, 135 S. Ct. at 862. While RFRA forecloses asking whether the exercise is "compelled by, or central to, a system of religious belief," 42 U.S.C. § 2000cc-5(7)(A), the court does ask whether the plaintiff's beliefs are sincere. The answer is no if his claims are not "sincerely based on a religious belief" but instead on "some other motivation." *Holt*, 135 S. Ct. at 862; *see also Hobby Lobby*, 134 S. Ct. at 2774 n.28 ("To qualify for RFRA's protection, an asserted belief must be 'sincere.'").

Next, the plaintiff bears the "burden of proving that the [law or regulation] substantially burden[s] that exercise of religion." *Holt*, 135 S. Ct. at 862. The court asks whether he has been "put[ ] to th[e] choice" of either "'engag[ing] in conduct that seriously violates [his] religious beliefs" or facing "serious" consequences. *Id.* (quoting *Hobby Lobby*, 134 S. Ct. at 2775); *see also Thomas*, 450 U.S. at 718 (stating a substantial burden exists when the government places "substantial pressure on an adherent to modify his behavior and to violate his beliefs"). The answer is no if the plaintiff can identify "no [compelled] action or forbearance on his part." *Kaemmerling*, 553 F.3d at 679 (plaintiff objecting to

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[1] RLUIPA "targets two areas of state and local action: land use regulation, 42 U.S.C. § 2000cc (RLUIPA § 2), and restrictions on the religious exercise of institutionalized persons, § 2000cc–1 (RLUIPA § 3)." *Sossamon v. Texas*, 131 S. Ct. 1651, 1656 (2011). It "borrows important elements from RFRA . . . but is less sweeping in scope." *Id.*

the government's extraction of DNA information from fluid or tissue samples but not to providing DNA samples); *see also Bowen v. Roy*, 476 U.S. 693, 699–700 (1986) (plaintiff objecting to the government's independent utilization of his daughter's social security number, which he himself was not required to provide or use). The answer is also no where the pressure being placed upon a person to act contrary to his beliefs or the consequences he faces for not doing so are not substantial. *See Thomas*, 450 U.S. at 717 (assessing the "coercive impact" of being "put to a choice between fidelity to religious belief or cessation of work"). Finally, this Court has "inquir[ed] into the importance of a religious practice" to the individual. *Henderson v. Kennedy*, 265 F.3d 1072, 1074 (D.C. Cir. 2001) (denying rehearing en banc). In doing so, we have found no substantial burden exists where a regulation is "at most a restriction on one of a multitude of means" for an individual to engage in his desired religious exercise. *Henderson v. Kennedy*, 253 F.3d 12, 17 (D.C. Cir. 2001) (the plaintiffs could spread the gospel any number of ways, just not the prohibited means of selling t-shirts on the National Mall); *see also Mahoney*, 642 F.3d at 1120–21 (the plaintiff had ample alternative means of spreading his religious message besides chalking the sidewalk in front of the White House).[2]

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[2] While the propriety of this sort of inquiry in pure free exercise cases is arguably called into question by recent Supreme Court precedent, *see Holt*, 135 S. Ct. at 862, it is not relevant to this case. That the practice Plaintiffs defend here is of sufficient importance to them to form the basis of a substantial burden under RFRA has not been questioned.

Here, Plaintiffs' faith compels them to provide their employees and students with health insurance plans. Oral Arg. Tr. at 19:5–15. Their religious beliefs forbid them not only from providing or paying for contraception, but also from facilitating its provision. Pls. Br. at 15. Plaintiffs therefore believe they exercise their religion by providing health insurance plans that do not facilitate access to contraception. *Id.* at 11-12, 15, 24–25. In determining whether an act constitutes impermissible facilitation Plaintiffs are informed by "the Catholic doctrines of material cooperation and scandal." *Id.* at 36. The sincerity of Plaintiffs' beliefs has not been questioned. Slip Op. at 26.

Plaintiffs identify at least two acts that the regulations compel them to perform that they believe would violate their religious obligations: (1) "hiring or maintaining a contractual relationship with any company required, authorized, or incentivized to provide contraceptive coverage to beneficiaries enrolled in Plaintiffs' health plans," Pet. for Reh'g En Banc at 3; and (2) "filing the self-certification or notification," *id.* at 4. Plaintiffs have therefore shown both that they are being compelled to modify their behavior and that, if undertaken, the modification would be a violation of their religious beliefs. They are unlike the plaintiffs in *Kaemmerling* and *Bowen*, as they have shown they are themselves being compelled to modify their behavior.

If Plaintiffs do not act in violation of their beliefs, however, they face two alternatives. First, they may offer coverage that does not include contraceptives and face onerous fines. 26 U.S.C. § 4980D(b)(1). Alternatively, they may stop providing health

insurance altogether, which would also be a violation of their religious beliefs. Oral Arg. Tr. at 19:5–15. Imposing such harsh consequences certainly substantially pressures Plaintiffs to alter their behavior in a way inconsistent with their religious beliefs. *See Hobby Lobby*, 134 S. Ct. at 2759 (stating if "heavy" financial penalties "do not amount to a substantial burden, it is hard to see what would"). Plaintiffs have therefore demonstrated their free exercise is substantially burdened: they are being "put[ ] to [the] choice" of either "'engag[ing] in conduct that seriously violates [their sincere] religious beliefs'" or facing "serious" consequences. *Holt*, 135 S. Ct. at 862 (quoting *Hobby Lobby*, 134 S. Ct. at 2775).

B

The panel's opinion parts ways with precedent by wading into impermissible lines of inquiry. The panel did not dispute that federal law operates to compel Plaintiffs to maintain a relationship with an issuer or TPA that will provide the contraceptive coverage and to execute the self-certification or alternative notice. Their disagreement with Plaintiffs is about the *significance* of those compelled acts; in other words, the panel rejected the "adherents' claim about the religious meaning of the undisputed operation of [ ] federal regulation[s]." Concurring Op. at 1; *see also Eternal Word Television Network, Inc. v. Sec'y, Dep't of Health & Human Servs.*, 756 F.3d 1339, 1340 (11th Cir. 2014) (Pryor, J. specially concurring) (disposing of the argument that the plaintiff's complaint should "fail[ ] because [the plaintiff] holds an erroneous legal opinion about how the contraception mandate works" because the

plaintiff "offer[ed] no evidence that its complaint turns on the advice of counsel" but instead offered "undisputed declarations . . . about the ancient teachings of the Catholic Church"). With a thorough analysis of the regulations, the panel determined they "do not compel" Plaintiffs to "provide, pay for, and/or facilitate access to contraception, sterilization, abortion, or related counseling in a manner that violates the teachings of the Catholic Church." Slip Op. at 26 (quoting Pls.' Br. at 15). The panel explained the regulations allow Plaintiffs to "wash[ ] their hands of any involvement in providing insurance coverage for contraceptive services." *Id.* Therefore, the panel concluded, Plaintiffs have been subjected to only to a *de minimis* burden of completing a form, and their RFRA claim fails. *Id.* at 31.

In declaring that—contrary to Catholic Plaintiffs' contentions—it would be consistent with the teaching of the Catholic Church for Plaintiffs to comply with the regulations the panel exceeded both the "judicial function and [the] judicial competence." *Thomas*, 450 U.S. at 716. What amounts to "facilitating immoral conduct," Pet. for Reh'g En Banc at 1, "scandal," *id.* at 7, and "material" or "impermissible cooperation with evil," *id.*; Slip Op. at 14, are inherently theological questions which objective legal analysis cannot resolve and which "federal courts have no business addressing." *Hobby Lobby*, 134 S. Ct. at 2778; *see also id.* (stating "the circumstances under which it is wrong for a person to perform an act that is innocent in itself but has the effect of enabling or facilitating the commission of an immoral act by another" is "a difficult and important question of religion and moral philosophy"). The causal connection sufficient to

create impermissible "facilitation" in the eyes of a religious group may be very different from what constitutes proximate cause in the common law tradition. *See Univ. of Notre Dame*, 743 F.3d at 566 (Flaum, J., dissenting) ("[W]e are judges, not moral philosophers or theologians; this is not a question of legal causation but of religious faith."). Likewise, where civil authorities may conclude an individual has "wash[ed his] hands of any involvement," Slip Op. at 26, adherents of a faith may examine the same situation and, in their religious judgment, reach the opposite conclusion. Pontius Pilate, too, washed his hands, but perhaps he perceived the stain of complicity remained. *See Matthew* 27:24.

Under the panel's analysis, it seems no claim of substantial burden may prevail where the religious significance of conduct under scripture as interpreted by a faith tradition differs from the legal significance of that conduct under the laws of the United States as interpreted by federal judges. But RFRA would be an exceedingly shallow—perhaps nonexistent—protection of religious exercise if adherents were only permitted to give the same meaning to their actions or inactions as does the secular law.

Plaintiffs, including an Archbishop and two Catholic institutions of higher learning, say compliance with the regulations would facilitate access to contraception in violation of the teachings of the Catholic Church. What law or precedent grants this Court authority to conduct an independent inquiry into the correctness of this belief? Instead, where one sincerely believes performing certain acts would cause him to cross the line between permissible behavior and sin, the Supreme Court has

instructed, "it is not for us to say that the line he drew was an unreasonable one." *Hobby Lobby*, 134 S. Ct. at 2778 (quoting *Thomas*, 450 U.S. at 715). Plaintiffs' sincere determination about the obligations their religion imposes is between them and their God and need not be "acceptable, logical, consistent, or comprehensible to others in order to merit . . . protection." *Thomas*, 450 U.S. at 714. This is so even when, in the government's opinion, Plaintiffs' determination is based on a misunderstanding of the nature of their legal obligations, their religious obligations, or both—as the two could certainly overlap.[3] RFRA's concern is

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[3] Confusion remains as to the legal obligations the regulations impose on third party administrators ("TPAs"). In *Wheaton College v. Burwell*, Justice Sotomayor explained a TPA does not have an independent obligation but instead "bears the legal obligation to provide contraceptive coverage only upon receipt of a valid self-certification." 134 S. Ct. 2806, 2814 n.6 (2014) (Sotomayor, J., dissenting) (citing 26 C.F.R. § 54.9815–2713A(b)(2) (2013); 29 C.F.R. § 2510.3–16(b) (2013)). Even evaluating the new regulations as supplemented in light of the Supreme Court's ruling in *Wheaton College*, the panel did not identify any scenario under which a TPA is obligated to provide contraceptive coverage until the TPA is designated a "plan administrator" for purposes of ERISA. Slip Op. 41–43. As the regulations currently stand, this designation occurs only after a religious nonprofit has either completed the self-certification form or the alternative notice and after the TPA agrees to enter into or remain in a contractual relationship with the nonprofit organization. *See* 26 C.F.R. § 54.9815-2713AT(b)(2) (2014) ("*If* a third party administrator *receives* a copy of the self-certification from an eligible organization or a notification from the Department of Labor [sent after the religious nonprofit provides notice of its objection to the Department] . . . *and agrees* to enter into or remain in a contractual relationship with the eligible organization . . . the third party administrator shall provide or arrange for payments of contraceptive services . . . .") (emphasis

with the *sincerity* of religious beliefs and not their *accuracy*. For example in *United States v. Lee*, Mr. Lee claimed he could not pay social security taxes without violating an obligation under his Amish faith to care for fellow church members. 455 U.S. 252, 257 (1982). The Supreme Court refused to consider the government's argument that paying social security taxes did not actually interfere with exercise of this belief, as the Amish would remain free to care for their own community if they paid social security taxes but did not collect benefits. *Id.* Instead the Court simply accepted Mr. Lee's "contention that both payment and receipt of social security benefits is forbidden by the Amish faith," explaining "[c]ourts are not arbiters of scriptural interpretation." *Id.* (quoting *Thomas*, 450 U.S. at 716).

The panel's analysis further parts ways with precedent by recasting Plaintiffs' objection to the facilitation of access as an objection to the conduct of third parties. Slip Op. at 34. The panel relied on *Bowen* and *Kaemmerling* to find Plaintiffs may not object "to the role of [their] action in the broader regulatory scheme." Slip Op. at 35. There are two problems with this analysis. First, in this case the government is requiring *Plaintiffs* to perform objectionable acts. In contrast, the *Bowen* and *Kaemmerling* plaintiffs' objections were to the *government's* actions. *See Bowen*, 476 U.S. at 699–700; *Kaemmerling*, 553 F.3d at 678. The claims in *Bowen* and *Kaemmerling* are different in kind from a

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added). If the panel relied on a mistaken assumption about the regulations imposing an independent obligation on TPAs to provide contraceptive coverage, rehearing en banc is all the more warranted.

claim that the government is compelling the individual *himself* to undertake actions he believes are sinful.

Second, the actions to which Plaintiffs object—which may seem innocent if examined devoid of context—must be understood in light of the broader regulatory scheme. When the Supreme Court has considered claims involving beliefs about facilitation of immoral conduct, it has not employed the panel's approach of requiring the adherent to view their own actions in isolation. Instead the Court found a substantial burden where the plaintiffs were compelled to take actions they believed to be impermissible based on the actions' place in a chain of events. *See, e.g.*, *Hobby Lobby*, 134 S. Ct. at 2759 (the plaintiffs objected to providing access to abortifacients because *others*' use of the drugs may result in the destruction of a human embryo); *Thomas*, 450 U.S. at 710 (plaintiff objected to fabricating turrets because those turrets would then be affixed by *others* to military tanks and used by *others* in warfare). This makes good sense, as the concept of facilitation inherently involves a view of one's conduct in relation to that of others'. Logic and precedent therefore compel us to permit persons to object to performing an act that would be itself innocent but for its illicit consequences. Plaintiffs object to maintaining a relationship with an issuer or third-party administrator ("TPA") that will use Plaintiffs' health insurance plans as vehicles to provide contraceptive coverage. They object to completing, as the panel describes it, an "opt-out mechanism that shifts to third parties the obligation to provide contraceptive coverage." Slip Op. at 36. Such claims do not fall outside the purview of RFRA.

III

As Plaintiffs have demonstrated a substantial burden on their free exercise, the government may only prevail by demonstrating the regulations further a compelling interest and employ the least restrictive means of doing so. 42 U.S.C. § 2000bb–1. A compelling interest is an interest "of the highest order." *Yoder*, 406 U.S. at 215. To satisfy strict scrutiny, the government must "specifically identify an actual problem in need of solving" and the burden on free exercise "must be actually necessary to the solution." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011) (internal citations and quotations omitted). The panel found the government demonstrated a compelling interest in "seamless provision of contraceptive services." Slip Op. at 49. The panel then rejected any less restrictive means of providing contraceptive coverage without cost sharing that would require women to complete additional steps to obtain the coverage, explaining such means "make the coverage no longer seamless from the beneficiaries' perspective." *Id.* at 24.

Even assuming for the sake of argument that the government possesses a compelling interest in the provision of contraceptive coverage without cost sharing, it has not succeeded in demonstrating a compelling interest in the "seamless" provision of coverage. The government has pointed to no evidence in the record demonstrating its purported interest in providing contraceptive coverage without cost-sharing is harmed when women must undergo additional administrative steps to receive the coverage. The government cites only to one page in the Federal Register to support the proposition that

coverage must be provided seamlessly.[4] Gov't Supp. Br. at 20 (citing 78 Fed. Reg. 39,870, 39,888 (Jul. 2, 2013)). This page provides no evidence that a procedure under which individuals must take additional steps to receive contraceptive coverage poses a "problem in need of solving," but instead offers only conclusory and unsubstantiated statements that surely cannot be sufficient for the government to meet its burden in strict scrutiny analysis. That "additional steps" would be so burdensome as to hinder women's access to contraception is pure speculation. For example, if all that was required was that the employee or student fills out a "simple, one-step form," that would be a "*de minimis* requirement" to which we assume the panel would have no objection. Slip Op. at 26, 31; *see also Roman Catholic Archdiocese of New York v. Sebelius*, 987 F. Supp. 2d 232, 256 (E.D.N.Y. 2013) ("If these steps only entail filling out a form, it seems that the burden of filling out that form should fall on those who have no religious objection to doing so.").

Further, the government cannot meet its burden of demonstrating a compelling interest where it leaves "appreciable damage to [the] supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (quoting *Fla. Star v. B.J.F.*, 491 U.S. 524, 542 (1989)

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[4] The government also references pages of a 2011 Institute of Medicine Report entitled, "Clinical Preventative Services for Women: Closing the Gaps." Gov't Supp. Br. at 20 (citing pages 103–07). These pages of the report discuss benefits of contraceptive services and do not reference, much less weigh, the comparative advantage or disadvantage of procedures for accessing those services.

(Scalia, J., concurring)); *see also Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) (stating a law's purpose is undermined when it is "so woefully underinclusive as to render belief in [its] purpose a challenge to the credulous"). As the panel notes, the Affordable Care Act permits employers to "ceas[e] to offer health insurance as an employment benefit, and instead pay[ ] the shared responsibility assessment and leav[e] the employees to obtain subsidized health care coverage on an insurance exchange." Slip Op. at 23. While Plaintiffs state they cannot exercise this option without violating their religious obligations, Oral Arg. Tr. at 19:5–15, the panel nevertheless reminds them it would be acceptable under the law. Slip Op. at 23. The untold many whose employers provide no health insurance and instead pay the assessment must face "logistical, informational, and administrative burdens," *id.* at 63, in arranging for subsidized coverage on a health insurance exchange. They must "take steps to learn about, and to sign up for," 78 Fed. Reg. at 39,888, health insurance on their own. The government simply cannot argue with a straight face that women who gain access to contraceptive coverage by identifying and signing up for a subsidized health insurance plan on a government exchange receive that coverage "seamlessly." *Cf. Hobby Lobby*, 134 S. Ct. at 2783. Therefore, in leaving "appreciable damage" to its "supposedly vital interest" in seamless provision of contraceptive coverage, the government's regulations cannot survive strict scrutiny. *Church of the Lukumi Babalu Aye*, 508 U.S. at 547 (quoting *Fla. Star*, 491 U.S. at 542 (Scalia, J., concurring)).

The question of least restrictive means then becomes the other side of the same coin. The

government could treat employees whose employers do not provide complete coverage for religious reasons the same as it does employees whose employers provide no coverage. This would entail providing for subsidized—or in this case free—contraceptive coverage to be made available on health care exchanges. An employee of a religious objector then would face the same administrative burdens as those who find complete coverage—including contraceptive services coverage—on the exchanges. However, just like others who use the exchanges, after overcoming these administrative hurdles, employees of religious objectors would have contraceptive coverage without cost sharing. Such a mechanism would therefore be effective and would minimize the burden on religious adherents, demonstrating its viability as a less restrictive means than the current regulations.

IV

The Supreme Court has interpreted the First Amendment to deprive individuals of constitutional protection against neutral laws—meaning almost any law where the government does not announce its intention "to infringe upon or restrict practices because of their religious motivation." *Church of the Lukumi Babalu Aye*, 508 U.S. at 533. Genuine neutrality, however, would "allow[ ] many different and contending voices to be represented in public discourse." Michael W. McConnell, *Why is Religious Liberty the "First Freedom"?*, 21 CARDOZO L. REV. 1243, 1262 (2000). When the state quells disparate voices, declaring a winner on one side of the culture wars, neutrality becomes a proxy for majoritarianism and secularism. *Id.*

Priests for Life is an organization that exists solely for the purpose of countering the benign narrative that contraception and abortion are beneficial to women. The other Plaintiffs exist, at least in part, to engender a counter-cultural narrative that "life begins at the moment of conception . . . and that certain 'preventative' services that interfere with conception or terminate a pregnancy are immoral." Pls. Br. at 15. Those who accept employment with these organizations and students who enroll at these schools do so with full awareness of their mediating stance. Nevertheless, though the government acknowledges that a primary goal of such organizations is to oppose the government's mission of increasing access to and use of contraception, it places them outside its grudging religious exemption and offers only one real choice—they can renounce their religious scruples overtly or in practical effect. If the government coopts their contractors and administrative structures to dispense advice, drugs, and services that contravene their religious views, in effect, it has written contraceptive care, including access to abortifacients, into Plaintiffs' employment contracts and student health care agreements. Commandeering is not accommodation, and, in this context, "seamlessness" is just shorthand for surrender.

The French have another saying, mocking the Bourbon restoration: *ils n'ont rien appris, ni rien oublié. Learning nothing and forgetting nothing.* The modern maxim does the Bourbon monarchs one better: learning nothing and forgetting everything. Alas, preserving the fragile ark of our constitutionalism requires us to remember that the

first principle of liberty is freedom from gratuitous coercion. We respectfully dissent.

KAVANAUGH, *Circuit Judge*, dissenting from the denial of rehearing en banc: In my respectful view, the panel opinion misapplies the Religious Freedom Restoration Act and contradicts the Supreme Court's recent decisions in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014), and *Little Sisters of the Poor Home for the Aged v. Sebelius*, 134 S. Ct. 1022 (2014). I would grant rehearing en banc and rule for the plaintiff religious organizations.

At the outset, it is important to recognize that two of the key Supreme Court precedents here – *Hobby Lobby* and *Wheaton College* – were divided decisions with vigorous dissents. Some believe that those two decisions tilted too far in the direction of religious freedom. Others, by contrast, think that those decisions did not go far enough in the direction of religious freedom. We are a lower court in a hierarchical judicial system headed by "one supreme Court." U.S. Const. art. III, § 1. It is not our job to re-litigate or trim or expand Supreme Court decisions. Our job is to follow them as closely and carefully and dispassionately as we can. Doing so here, in my respectful view, leads to the conclusion that the plaintiff religious organizations should ultimately prevail on their RFRA claim, but not to the full extent that they seek.

Some background: The Affordable Care Act requires most employers, including non-profit organizations, to provide health insurance coverage for their employees or else pay a significant monetary penalty to the Government. By regulation, that insurance must cover all FDA-approved contraceptives, including certain methods of birth

control that, some believe, operate as abortifacients and result in the destruction of embryos.

As a religious accommodation, the regulations exempt religious non-profit organizations from the contraceptive mandate. To be exempt from the monetary penalty, however, the religious organizations must either submit a form with certain required information to their insurer or submit a letter with certain required information to the Secretary of Health and Human Services.[1] (For ease of reference, I will use the term "form" to cover both documents.) The insurer must continue to provide contraceptive coverage to the religious organizations'

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[1] The form submitted to a religious organization's insurer must certify that the organization (1) opposes providing coverage for some or all of the contraceptive services required by the contraceptive mandate on account of religious objections; (2) is organized and operates as a non-profit entity; and (3) holds itself out as a religious organization. *See* 29 C.F.R. § 2590.715-2713A(a), (b)(1)(ii), (c)(1); 45 C.F.R. § 147.131(b), (c)(1). In certain circumstances, the form must also "include notice" of the insurer's obligations to provide contraceptive coverage to the religious organization's employees. 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(A).

The letter to the Secretary of Health and Human Services must include the following information: (1) the name of the religious non-profit organization; (2) the basis on which it qualifies for an accommodation; (3) its objection based on sincerely held religious beliefs to providing coverage for some or all contraceptive services, including notice of the subset of contraceptive services to which it objects; (4) its insurance plan's name and type; and (5) the name and contact information for any of the insurance plan's third party administrators and health insurance issuers. *See* 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B), (c)(1)(ii); 45 C.F.R. § 147.131(c)(1)(ii); Coverage of Certain Preventative Services Under the Affordable Care Act, 79 Fed. Reg. 51,092, 51,094-95 (Aug. 27, 2014).

employees, albeit with separate funds provided either by the insurer itself or by the United States.

Many prominent religious organizations around the country – including the plaintiffs in this case – have bitterly objected to this scheme. They complain that submitting the required form contravenes their religious beliefs because doing so, in their view, makes them complicit in providing coverage for contraceptives, including some that they believe operate as abortifacients. They say that the significant monetary penalty for failure to submit the form constitutes a substantial burden on their exercise of religion. They contend, moreover, that the Government has less restrictive ways of ensuring that the employees of the religious organizations have access to contraception without making the organizations complicit in the scheme in this way.

The plaintiffs in this case have sued under the Religious Freedom Restoration Act, known as RFRA. RFRA grants individuals and organizations an exemption from generally applicable federal laws that "substantially burden" their "exercise of religion," unless the Government demonstrates that the law furthers a "compelling governmental interest" and is the "least restrictive means" of furthering that interest. 42 U.S.C. § 2000bb-1.[2] As the Supreme Court has explained, "RFRA was designed to provide very broad protection for religious liberty." *Hobby*

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[2] The relevant section of RFRA provides in full: "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

Lobby, 134 S. Ct. at 2767, slip op. at 17. RFRA statutorily incorporated the compelling interest test that the Supreme Court had applied in cases such as *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). 42 U.S.C. § 2000bb(b)(1).

Under RFRA and the relevant Supreme Court case law, we must consider three questions here. First, do the regulations – which compel religious organizations to submit the required form or else pay significant monetary penalties – "substantially burden" the religious organizations' "exercise of religion"? Second, if so, does the Government have a "compelling" interest in facilitating access to contraception for the employees of these religious organizations? Third, if the Government does have such a compelling interest, do the regulations represent the "least restrictive" means of furthering that interest?

I conclude as follows:

First, under *Hobby Lobby*, the regulations substantially burden the religious organizations' exercise of religion because the regulations require the organizations to take an action contrary to their sincere religious beliefs (submitting the form) or else pay significant monetary penalties.

Second, that said, *Hobby Lobby* strongly suggests that the Government has a compelling interest in facilitating access to contraception for the employees of these religious organizations.

Third, this case therefore comes down to the least restrictive means question. Under *Hobby Lobby*, *Wheaton College*, and *Little Sisters of the Poor*, requiring the religious organizations to submit this

form is not the Government's least restrictive means of furthering its interest in facilitating access to contraception for the organizations' employees. Rather, the Government can achieve its interest even if it accepts the less restrictive notice that the Supreme Court has already relied on in the *Wheaton College* and *Little Sisters of the Poor* cases. Unlike the form required by current federal regulations, the *Wheaton College/Little Sisters of the Poor* notice does not require a religious organization to identify or notify its insurer, and thus lessens the religious organization's complicity in what it considers to be wrongful. And even with just the *Wheaton College/Little Sisters of the Poor* notice, the Government can independently determine the identity of the organization's insurer and thereby ensure that the same insurer continues to provide the same contraceptive coverage to the organization's employees. Hence, the *Wheaton College/Little Sisters of the Poor* notice is a less restrictive way for the Government to achieve its compelling interest.

I

First, under *Hobby Lobby*, this regulatory scheme imposes a substantial burden on plaintiffs' exercise of religion.

Under RFRA, a substantial burden on the exercise of religion occurs when, for example, the Government imposes sanctions or punishment on someone, or denies a benefit to someone, for exercising his or her religion. Thus, if the Government requires someone (under threat of incurring monetary sanctions or punishment, or of having a benefit denied) to act or to refrain from acting in violation of his or her sincere religious beliefs, that constitutes a substantial

burden on the exercise of religion. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775-79, slip op. at 31-38 (2014); *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 717-18 (1981); *Sherbert v. Verner*, 374 U.S. 398, 403-04 (1963).

That is precisely what has happened here.

The "substantial burden" in this case comes from the large monetary penalty imposed on religious organizations that choose not to submit the required form. *Cf. Hobby Lobby*, 134 S. Ct. at 2775-76, 2779, slip op. at 31-32, 38. It is settled that a direct monetary penalty on the exercise of religion constitutes a "substantial burden." *See id.* (penalty for not providing contraceptive coverage); *Wisconsin v. Yoder*, 406 U.S. 205, 208, 218-19 (1972) (fine for not sending children to high school); *Sherbert*, 374 U.S. at 404 (describing hypothetical fine for Saturday worship).[3]

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[3] The Supreme Court has determined that denying benefits to (and not just imposing penalties on) someone engaged in conduct mandated by religious belief imposes a substantial burden on the exercise of religion. In denial-of-benefits cases, "[w]hile the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Thomas*, 450 U.S. at 718. Congress incorporated that broad understanding of substantial burden into RFRA. Of course, the question of indirect burdens from the denial of government benefits is not at issue in this case. Here, we have the classic direct monetary penalty compelling conduct that contravenes religious belief. There has never been a question that such a direct penalty imposes a substantial burden on the exercise of religion. *See Hobby Lobby*, 134 S. Ct. at 2775-76, 2779, slip op. at 31-32, 38; *Yoder*, 406 U.S. at 208, 218; *Sherbert*, 374 U.S. at 404. Put simply, it is black-letter law that a "substantial burden" on the exercise of religion occurs when, as here, the government

Therefore, the remaining question with respect to the first prong of the RFRA analysis is whether submitting the form actually contravenes plaintiffs' sincere religious beliefs. In analyzing that question, we must first understand the context in which the question arises. In most religious liberty cases, the Government has said in essence: "Do X or suffer a penalty." The religious objector responds that X violates his or her religious beliefs. For example, in the recent *Holt v. Hobbs* case, it was "shave your beard or suffer a penalty." *See Holt v. Hobbs*, 135 S. Ct. 853, 860-61, slip op. at 4 (2015). Or in the classic *Wisconsin v. Yoder* case, it was "send your children to high school or pay a $5 fine." *See* 406 U.S. at 208. Or in *United States v. Lee*, it was "pay the Social Security tax or suffer a penalty." *See* 455 U.S. 252, 254-55 (1982). Simple enough.

Here, the situation is only slightly more complicated. The Government has said in essence: "Do X or Y or suffer a penalty." X is provide contraceptive coverage. Y is submit the form. All agree that X – providing contraceptive coverage – implicates plaintiffs' "exercise of religion." But religious organizations can avoid that option by choosing Y – submitting the form. In other words, the Government is exempting religious organizations from providing contraceptive coverage but is still saying: "Submit the form or suffer a penalty."

As a result, the key inquiry under the first prong of RFRA is whether submitting the form violates

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"compel[s] someone to do something that violates his religious beliefs, or prohibit[s] someone from doing something that is mandated by his religious beliefs." Eugene Volokh, *The First Amendment and Related Statutes* 1060 (5th ed. 2014).

plaintiffs' sincere religious beliefs. The form is part of the process by which the Government ensures that the religious organizations' insurers provide contraceptive coverage to the organizations' employees. To plaintiffs, the act of "submitting" this form would, "in their religious judgment, impermissibly facilitate[ ] delivery" of contraceptive and abortifacient coverage. Plaintiffs' Supplemental Br. 1.

As the Supreme Court stated in *Hobby Lobby*, such a question of complicity – that is, when "it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another" – is "a difficult and important question of religion and moral philosophy." *Hobby Lobby*, 134 S. Ct. at 2778, slip op. at 36. Judge Gorsuch has explained well the complicity issue that arises in these circumstances: "All of us face the problem of complicity. All of us must answer for ourselves whether and to what degree we are willing to be involved in the wrongdoing of others. For some, religion provides an essential source of guidance both about what constitutes wrongful conduct and the degree to which those who assist others in committing wrongful conduct themselves bear moral culpability. [Plaintiffs] are among those who seek guidance from their faith on these questions. Understanding that is the key to understanding this case." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1152 (10th Cir. 2013) (Gorsuch, J., concurring).

But what if the religious organizations are misguided in thinking that this scheme – in which the form is part of the process by which the

Government ensures contraceptive coverage – makes them complicit in facilitating contraception or abortion? That is not our call to make under the first prong of RFRA. The Supreme Court has emphasized that judges in RFRA cases may question only the sincerity of a plaintiff's religious belief, not the correctness or reasonableness of that religious belief. *See Hobby Lobby*, 134 S. Ct. at 2774 n.28, 2777-79, slip op. at 29 n.28, 35-38; *see also Thomas*, 450 U.S. at 714-16.[4] The Supreme Court has long stated,

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[4] In that regard, it is important to note at least three limits on a claimant's ability to prevail under RFRA.

First, RFRA does not provide protection to philosophical, policy, political, or personal beliefs, for example. It protects only religious beliefs. 42 U.S.C. § 2000bb-1(a) ("Government shall not substantially burden a person's *exercise of religion* even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.") (emphasis added).

Second, RFRA does not cover *insincere* religious beliefs – that is, beliefs that are not truly held – such as when someone asserts a personal objection dressed up as a religious objection. Under RFRA, the courts must police sincerity. As the Supreme Court has explained, RFRA reflects Congress's confidence in "the ability of the federal courts to weed out insincere claims." *Hobby Lobby*, 134 S. Ct. at 2774, slip op. at 29. And the *Hobby Lobby* Court approvingly cited a number of cases where courts have inquired into the sincerity of religious claims. *Id.* at 2774 nn.28-29, slip op. at 29-30 nn.28-29 (citing *United States v. Quaintance*, 608 F.3d 717, 718-19 (10th Cir. 2010); *Abate v. Walton*, 77 F.3d 488, 1996 WL 5320, at *5 (9th Cir. Jan. 5, 1996); *Ochs v. Thalacker*, 90 F.3d 293, 296 (8th Cir. 1996); *Green v. White*, 525 F. Supp. 81, 83-84 (E.D. Mo. 1981); *Winters v. State*, 549 N.W.2d 819, 819-20 (Iowa 1996)). As the Supreme Court has previously stated: "[W]hile the truth of a belief is not open to question, there remains the significant question whether it is truly held. This is the threshold question of sincerity which must be resolved in every case." *United States v. Seeger*, 380 U.S. 163, 185 (1965) (internal quotation marks omitted). In

moreover, that religious beliefs need not be "acceptable, logical, consistent, or comprehensible to others" in order to merit protection. *Thomas*, 450 U.S. at 714. As Justice Brennan, the primary architect of the body of religious freedom law now incorporated into RFRA, once put it: "[R]eligious freedom – the freedom to believe and to practice strange and, it may be, foreign creeds – has classically been one of the highest values of our society." *Braunfeld v. Brown*, 366 U.S. 599, 612 (1961) (Brennan, J., concurring in part and dissenting in part).

That bedrock principle means that we may not question the wisdom or reasonableness (as opposed to the sincerity) of plaintiffs' religious beliefs – including about complicity in wrongdoing. In *Hobby Lobby*, the Supreme Court emphatically confirmed that point. There, as here, the Government argued that the employers' alleged complicity in providing contraception did not infringe on the employers' religious beliefs. In particular, the Government claimed that "the connection between what the objecting parties must do" (pay for insurance) and "the end that they find to be morally wrong (destruction of an embryo)" was "simply too attenuated" because the end would occur only as a

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short, in these religious freedom cases, the courts appropriately "inquir[e] into the sincerity" of a claimant's "professed religiosity." *Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005) (applying the related Religious Land Use and Institutionalized Persons Act).

Third, as explained more fully below, RFRA's compelling interest standard allows the Government to compel or proscribe action in certain circumstances even though, by doing so, the Government may be substantially burdening someone's religion.

result of intervening decisions by individual covered employees. *Hobby Lobby*, 134 S. Ct. at 2777, slip op. at 35.

The Supreme Court adamantly rejected the basic premise of the Government's argument. The Court emphasized that federal courts have "no business" trying to answer whether the religious beliefs asserted in a RFRA case – including the complicity belief at issue in *Hobby Lobby* – are correct or reasonable. *Id.* at 2778, slip op. at 36. A federal court may not tell the objectors that "their beliefs are flawed," and thus may not arrogate to itself "the authority to provide a binding national answer to this religious and philosophical question" of complicity. *Id.* at 2778, slip op. at 36-37. Instead, the "narrow function" of federal courts is to determine whether the belief is sincere and "reflects an honest conviction." *Id.* at 2779, slip op. at 37-38 (internal quotation marks omitted). In doing so, moreover, courts must keep in mind that RFRA protects "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A) (defining "religious exercise" for purposes of the related Religious Land Use and Institutionalized Persons Act); *see id.* § 2000bb-2 (incorporating that Act's definition set forth in § 2000cc-5 into RFRA).

As a matter of religious belief, plaintiffs in this case say that the act of submitting the required form makes them complicit in moral wrongdoing. Importantly, no one here disputes that plaintiffs' religious belief is sincere and reflects an honest conviction. *Cf. Wheaton College v. Burwell*, 134 S. Ct. 2806, 2808, slip op. at 4 (2014) (Sotomayor, J.,

dissenting) ("The sincerity of Wheaton's deeply held religious beliefs is beyond refute."); *id.* at 2812, slip op. at 11. Therefore, plaintiffs' decision to decline to submit the required letter or form is an "exercise of religion" under RFRA. No one disputes, moreover, that plaintiffs will be required to pay huge monetary penalties if they do not submit the required form. Those large monetary penalties plainly represent a "substantial burden" on plaintiffs' exercise of religion. *See Hobby Lobby*, 134 S. Ct. at 2759, slip op. at 2.

Judge Flaum persuasively summarized the point in a similar case that involved Notre Dame: "Yet we are judges, not moral philosophers or theologians; this is not a question of legal causation but of religious faith. Notre Dame tells us that Catholic doctrine prohibits the action that the government requires it to take. So long as that belief is sincerely held, I believe we should defer to Notre Dame's understanding." *University of Notre Dame v. Sebelius*, 743 F.3d 547, 566 (7th Cir. 2014) (Flaum, J., dissenting), *vacated and remanded*, 135 S. Ct. 1528 (2015). Judge Pryor has likewise cogently explained: "So long as the [religious organization's] belief is sincerely held and undisputed – as it is here – we have no choice but to decide that compelling the participation of the [religious organization] is a substantial burden on its religious exercise." *Eternal Word Television Network, Inc. v. Secretary, Department of Health & Human Services*, 756 F.3d 1339, 1348 (11th Cir. 2014) (Pryor, J., specially concurring).

In short, under *Hobby Lobby*, the regulations substantially burden plaintiffs' exercise of religion.

The panel opinion concludes, however, that there is no substantial burden on plaintiffs' exercise of religion. In particular, the panel opinion says that plaintiffs are wrong to think that they would be complicit in moral wrongdoing if they submit this form, as required by the Government. But to reiterate: Judicially second-guessing the correctness or reasonableness (as opposed to the sincerity) of plaintiffs' religious beliefs is exactly what the Supreme Court in *Hobby Lobby* told us not to do. *See Hobby Lobby*, 134 S. Ct. at 2778, slip op. at 36. And *Hobby Lobby* was not the first Supreme Court case to say as much. *See Thomas*, 450 U.S. at 714-16.

The panel opinion responds that plaintiffs are simply misunderstanding the law and that the law, properly understood, does not actually make plaintiffs complicit in providing contraceptive coverage. But there is no dispute that the Government is requiring plaintiffs to submit a form (to the Government or to the insurer) or else pay a penalty. And there is no dispute that the form is part of the process by which the Government ensures that the religious organizations' insurers provide contraceptive coverage to the organizations' employees. In other words, the form matters and plays a role in this scheme. After all, if the form were meaningless, why would the Government require it? The Government is requiring plaintiffs to submit the form precisely because the form is part of the process by which the Government ensures that the religious organizations' insurers provide contraceptive

coverage to the organizations' employees.[5] Plaintiffs in turn sincerely believe that submitting the form under those circumstances makes them complicit in wrongdoing in contravention of their religious beliefs. *See* Plaintiffs' Supplemental Br. 1. Compelling submission of the form therefore imposes a substantial burden under RFRA.[6]

The panel opinion separately notes that the Government intended the form to accommodate religious organizations so that the organizations

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[5] If the form were meaningless, the Government presumably would not require it and perpetuate this rancorous dispute with religious organizations around the country.

[6] The panel's concurrence in the denial of rehearing en banc largely echoes Justice Sotomayor's dissent in *Wheaton College*. *Compare* Panel Concurrence at 5 ("In no respect do we, nor could we, question Plaintiffs' sincere beliefs about what their faith permits and forbids of them. But we can and must decide which party is right about how the law works."), *with Wheaton College*, 134 S. Ct. at 2812, slip op. at 10 (Sotomayor, J., dissenting) ("Wheaton is mistaken – not as a matter of religious faith, in which it is undoubtedly sincere, but as a matter of law . . . . Any provision of contraceptive coverage by Wheaton's third-party administrator would not result from any action by Wheaton; rather, in every meaningful sense, it would result from the relevant law and regulations."). But the Supreme Court, by a 6-3 margin, did not agree with Justice Sotomayor's dissent in *Wheaton College*, at least for purposes of the injunction. The Court instead granted an injunction under the All Writs Act to Wheaton College, which the Court could do only if it concluded that the required form "indisputably" would impose a substantial burden on Wheaton College's exercise of religion. *See Turner Broadcasting System, Inc. v. Federal Communications Commission*, 507 U.S. 1301, 1303 (1993) (Rehnquist, C.J., in chambers) (internal quotation marks omitted); *Wheaton College*, 134 S. Ct. at 2808, slip op. at 4 (Sotomayor, J., dissenting) (internal quotation marks omitted).

themselves would not have to provide contraceptive coverage. But the panel opinion has been faked out by the Government's accommodation. The accommodation provides an alternative, but the alternative itself imposes a substantial burden on the religious organizations' exercise of religion. Again, this case arises in a "Do X or Y or pay a penalty" posture. All agree that X – providing contraceptive coverage – infringes plaintiffs' exercise of religion. But so does Y – submitting the form. What the panel opinion misses is that submitting this form is *itself* an act that contravenes the organizations' sincere religious beliefs. It is no different from the recent *Holt* case, in which the act that contravened the Muslim prisoner's sincere religious beliefs was shaving his beard. Submitting the form = shaving your beard. Or the *Yoder* case, in which the act that contravened the Amish parents' beliefs was sending their children to high school. Submitting the form = sending your children to high school. Or the *Lee* case, in which the act that contravened the Amish employer's religious beliefs was paying Social Security taxes. Submitting the form = paying the Social Security tax. Or the *Sherbert* case, in which the act that contravened the Seventh-day Adventist's belief was working on Saturday, the Sabbath day of the faith. Submitting the form = working on the Sabbath.

In all of those cases, the Supreme Court recognized that the act in question represented a sincere religious belief that the Government could not override except by employing the least restrictive means to further a compelling governmental interest. The same is true here. The panel opinion does not fully come to grips with that critical point, in my view.

The panel opinion therefore also does not appreciate that the substantial burden on plaintiffs' exercise of religion comes from the monetary penalty (which in this case happens to be huge) that the organizations will have to pay if they adhere to their religious beliefs and do not submit the required form. In *Holt*, the substantial burden came from the discipline the prisoner would receive if he refused to shave his beard. In *Yoder*, it was the $5 monetary fine for the parents whose children did not attend high school. In *Lee*, it was the monetary penalty for failure to pay taxes. In *Sherbert*, it was the denial of unemployment benefits for not working on the Sabbath.

The essential principle is crystal clear: When the Government forces someone to take an action contrary to his or her sincere religious belief (here, submitting the form) or else suffer a financial penalty (which here is huge), the Government has substantially burdened the individual's exercise of religion. So it is in this case.

To be clear, that conclusion does *not* mean that plaintiffs prevail on their RFRA claim. Rather, it means only that they prevail on the *first prong* of the three-part RFRA inquiry and that we now must move on to the second and third prongs. The Government may still be able to compel plaintiffs to submit the required form if the Government prevails on those second and third prongs. *Cf. Lee*, 455 U.S. at 257, 261 (Government may force Amish employer to pay Social Security taxes notwithstanding substantial burden on Amish employer's religion).

II

Second, does the Government have a compelling interest in facilitating women's access to contraception – in particular, in facilitating access to contraception for the employees of these religious organizations? *See* 42 U.S.C. § 2000bb-1(b) ("Government may substantially burden a person's exercise of religion only if it demonstrates that *application of the burden to the person* . . . is in furtherance of a compelling governmental interest.") (emphasis added); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006) (compelling interest test focuses on interest as applied to particular plaintiffs).

The plaintiff religious organizations strenuously argue that there is no such compelling governmental interest. As I see it, however, plaintiffs' argument cannot be squared with the views expressed by a majority of the Justices in *Hobby Lobby*.

To begin with, how do we determine whether the Government has a "compelling interest" in overriding a fundamental constitutional or statutory right such as RFRA's right to religious freedom? Good question. No code or history book lists the Government's compelling interests. Rather, courts have developed those interests over time, in common-law-like fashion.[7] What we do know, to put it in colloquial

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[7] The compelling interest nomenclature took root somewhat ignominiously in free speech cases as a way to justify the Government's suppression of Communist speech. *See, e.g.*, *Konigsberg v. State Bar of California*, 366 U.S. 36, 49-52 (1961); *Barenblatt v. United States*, 360 U.S. 109, 126-27 (1959); *Sweezy v. New Hampshire*, 354 U.S. 234, 265-67 (1957) (Frankfurter, J., concurring in result). In any event, the compelling interest

and somewhat question-begging terms, is that the asserted governmental interest must be so critically important that it justifies overriding certain fundamental individual rights in certain circumstances. To quote the Supreme Court, the interest must be "of the highest order." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *see Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781, slip op. at 41 (2014). Examples of compelling interests from past Supreme Court cases include conducting the military draft, maintaining the tax system, running the Social Security program, and preventing discrimination against third parties. *See Gillette v. United States*, 401 U.S. 437, 461-63 (1971); *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680, 699-700 (1989); *United States v. Lee*, 455 U.S. 252, 257-59 (1982); *Bob Jones University v. United States*, 461 U.S. 574, 603-04 (1983).[8]

In this case, we do not have to tackle the compelling interest question without guidance from above. Justice Kennedy strongly suggested in his *Hobby Lobby* concurring opinion – which appears to

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override is now an established part of various constitutional doctrines, including the First and Fourteenth Amendments. And Congress expressly incorporated it into the Religious Freedom Restoration Act.

[8] As noted above, at least three aspects of RFRA limit the statute's reach and thus help answer the parade of horribles sometimes raised in opposition to religious freedom claims. First, RFRA covers only *religious* objections. Second, *insincere* religious claims are excluded from RFRA's protection. Third, RFRA's compelling interest standard allows the Government to compel or proscribe action in certain circumstances even though, by doing so, the Government may be substantially burdening someone's religion.

be controlling de facto if not also de jure on this particular issue – that the Government generally has a compelling interest in facilitating access to contraception for women employees. *Hobby Lobby*, 134 S. Ct. at 2785-86, slip op. at 2 (Kennedy, J., concurring); *see also id.* at 2779-80, slip op. at 39-40 (majority opinion); *id.* at 2799-2801, slip op. at 23-27 (Ginsburg, J., dissenting); *cf. Marks v. United States*, 430 U.S. 188, 193 (1977). In particular, Justice Kennedy referred to the "premise" of the Court's decision: namely, its "assumption" that the Government has a "legitimate and compelling interest" in facilitating access to contraception. *Hobby Lobby*, 134 S. Ct. at 2786, slip op. at 2 (Kennedy, J., concurring). Justice Kennedy's use of the term "compelling" in this context was no doubt carefully considered. And the four dissenting Justices likewise stated that the Government had a compelling interest in facilitating women's access to contraception. *Id.* at 2799-2801, slip op. at 23-27 (Ginsburg, J., dissenting).

It is not difficult to comprehend why a majority of the Justices in *Hobby Lobby* (Justice Kennedy plus the four dissenters) would suggest that the Government has a compelling interest in facilitating women's access to contraception. About 50% of all pregnancies in the United States are unintended. The large number of unintended pregnancies causes significant social and economic costs. To alleviate those costs, the Federal Government has long sought to reduce the number of unintended pregnancies, including through the Affordable Care Act by making contraceptives more cheaply and widely available. It is commonly accepted that reducing the number of unintended pregnancies would further women's

health, advance women's personal and professional opportunities, reduce the number of abortions,[9] and help break a cycle of poverty that persists when women who cannot afford or obtain contraception become pregnant unintentionally at a young age. In light of the numerous benefits that would follow from reducing the number of unintended pregnancies, it comes as no surprise that Justice Kennedy's opinion expressly referred to a "compelling" governmental interest in facilitating women's access to contraception.

In short, even if the Court did not formally hold as much, *Hobby Lobby* at least strongly suggests that the Government has a compelling interest in facilitating access to contraception for the employees of these religious organizations.[10]

III

Third, in light of those two conclusions, we must consider the least restrictive means issue. When, as here, a law substantially burdens the exercise of religion, but the law furthers a compelling governmental interest, RFRA requires the Government to use the "least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). The Supreme Court has

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[9] As the panel opinion in this case accurately pointed out, as of now about 40% of all unintended pregnancies end in abortion.

[10] Justice Kennedy's *Hobby Lobby* opinion did not expressly discuss whether a compelling governmental interest in ensuring general coverage for contraceptives encompasses ensuring coverage for those specific drugs and services that, some believe, operate as abortifacients and result in the destruction of embryos.

emphasized that the "least-restrictive-means standard is exceptionally demanding." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780, slip op. at 40 (2014).

Congress adopted the least restrictive means requirement to help thread the needle between two conflicting principles. The least restrictive means requirement, properly applied, allows religious beliefs to be accommodated *and* the Government's compelling interests to be achieved – a win-win resolution of these often contentious disputes. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006) (quoting 42 U.S.C. § 2000bb(a)(5)) (RFRA "'is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.'"). As a leading First Amendment scholar has put it: "If there's some way of granting an exemption and yet accomplishing the government's goal, then there's no real need to interfere with the religious practice, so the exemption must be granted." Eugene Volokh, *The First Amendment and Related Statutes* 986 (5th ed. 2014).

Requiring religious organizations to submit the form mandated by current federal regulations is not the Government's least restrictive means of furthering its interest in facilitating access to contraception for the organizations' employees. That is because the Government can still achieve its interest by allowing the religious organizations to submit the less restrictive notice that the Supreme Court has already *twice* indicated should be good enough to satisfy the Government's interest.

In the *Wheaton College and Little Sisters of the Poor* cases, the Supreme Court carefully specified that the religious organizations would satisfy their current legal obligations by submitting a simple notice to the Secretary of Health and Human Services "in writing that it is a nonprofit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive services." *Wheaton College v. Burwell*, 134 S. Ct. 2806, 2807, slip op. at 1 (2014); *see also Little Sisters of the Poor Home for the Aged v. Sebelius*, 134 S. Ct. 1022, 1022, slip op. at 1 (2014) (notice should be "in writing that they are non-profit organizations that hold themselves out as religious and have religious objections to providing coverage for contraceptive services"); *cf. Eternal Word Television Network, Inc. v. Secretary, Department of Health & Human Services*, 756 F.3d 1339, 1349 (11th Cir. 2014) (Pryor, J., specially concurring) ("The United States, for example, could require the [religious organization] to provide a written notification of its religious objection to the Department of Health and Human Services.").

By contrast to the form required by current federal regulations, the *Wheaton College/Little Sisters of the Poor* notice does not require the religious organizations to identify or notify their insurers, and thus (according to plaintiffs) lessens the religious organizations' degree of complicity in what they consider to be wrongful as a matter of religious belief. *See* Plaintiffs' Supplemental Br. 10. And even with the less detailed *Wheaton College/Little Sisters of the Poor* notice, the Government can independently determine the identity of the organizations' insurers and thereby ensure that the insurers provide contraceptive coverage to the organizations'

employees. The *Wheaton College/Little Sisters of the Poor* notice may create some administrative inconvenience for the Government, because the Government itself will have to identify the religious organizations' insurers. But administrative inconvenience alone does not negate the feasibility of an otherwise less restrictive means – unless the administrative problem would be "of such magnitude" that it would render "the entire statutory scheme unworkable." *Sherbert v. Verner*, 374 U.S. 398, 408-09 (1963); *see also Bowen v. Roy*, 476 U.S. 693, 731 (1986) (O'Connor, J., concurring in part and dissenting in part) ("[A]dministrative inconvenience is not alone sufficient to justify a burden on free exercise unless it creates problems of substantial magnitude.").

If a religious organization does not use the currently required form but instead uses the *Wheaton College/Little Sisters of the Poor* notice, how would that affect third parties, namely the religious organizations' employees? That question matters because the Supreme Court has stated that "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (applying the related Religious Land Use and Institutionalized Persons Act). In *Hobby Lobby*, the Court reiterated that this consideration "will often inform the analysis of the Government's compelling interest and the availability of a less restrictive means of advancing that interest." *Hobby Lobby*, 134 S. Ct. at 2781 n.37, slip op. at 42 n.37. As Justice Kennedy put it in his concurrence, the accommodation must not "unduly restrict other persons, such as employees, in protecting their own

interests." *Id.* at 2787, slip op. at 4 (Kennedy, J., concurring).

But here, the religious organizations' employees would still receive the *same* insurance coverage from the *same* insurer for contraceptives. As the Supreme Court explained in its *Wheaton College* order: "Nothing in this interim order affects the ability of the applicant's employees and students to obtain, without cost, the full range of FDA approved contraceptives" or "precludes the Government from relying on this notice, to the extent it considers it necessary, to facilitate the provision of full contraceptive coverage under the Act." *Wheaton College*, 134 S. Ct. at 2807, slip op. at 1-2. So accommodating the religious organizations by allowing them to use the *Wheaton College/Little Sisters of the Poor* notice would not, to use Justice Kennedy's formulation, "unduly restrict" third parties. *Cf.* Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 Yale L.J., at 116 (forthcoming 2015) (version of Apr. 10, 2015) ("*Wheaton College*, like *Hobby Lobby*, appears to tie accommodation to the fact that the government has other ways of providing for the statute's intended beneficiaries so that no third-party harm would result from the accommodation.").

Although the Supreme Court's *Wheaton College* and *Little Sisters of the Poor* orders were not final merits rulings, they at least qualify as extremely strong signals from the Supreme Court about how to resolve the least restrictive means issue in this case. In particular, the Court in *Wheaton College* granted an injunction under the All Writs Act, which is

appropriate "only where the legal rights at issue are indisputably clear." *Wheaton College*, 134 S. Ct. at 2808, slip op. at 4 (Sotomayor, J., dissenting) (internal quotation marks omitted). Moreover, the Court issued the *Wheaton College* order just days after its *Hobby Lobby* decision, and it did so over a detailed and forceful dissent.

In any event, regardless of whether we as a lower court are *formally* bound by the Supreme Court stay orders in *Wheaton College* and *Little Sisters of the Poor*, the notice identified by the Supreme Court in those two cases is undoubtedly a less restrictive way for the Government to further its interest than the form required by current federal regulations. It necessarily follows that the form required by current regulations is not the "least restrictive means" available to the Government. As the Supreme Court said a few months ago in a similar context: If "a less restrictive means is available for the Government to achieve its goals, the Government must use it." *Holt v. Hobbs*, 135 S. Ct. 853, 864, slip op. at 11 (2015) (internal quotation marks omitted). So too here.

To be sure, some religious organizations claim that even the less restrictive *Wheaton College/Little Sisters of the Poor* notice still imposes a substantial burden on their religious beliefs. But that obviously does not help *the Government's* argument in support of the current, even more burdensome form. The key point here is that the *Wheaton College/Little Sisters of the Poor* notice is less restrictive (that is, less burdensome) than the currently required form and yet still furthers the Government's compelling

interest. Under RFRA, the Government therefore must employ that less restrictive means.[11]

Put simply, the Government need not – and therefore under RFRA may not – pursue its compelling interest in facilitating access to contraception by requiring religious non-profit organizations to submit the form required by current federal regulations.[12]

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[11] The *Wheaton College/Little Sisters of the Poor* notice requires a religious organization to, in effect, raise its hand to opt out. But contrary to what the panel's concurrence in the denial of rehearing en banc says, *see* Panel Concurrence at 3-4 n.1, the currently required form requires a religious organization both to raise its hand *and* to point to its insurer. From the perspective of the plaintiff religious organizations, the currently required form is therefore more burdensome because it makes the organizations identify or notify their insurers, which the organizations believe makes them more complicit in the provision of contraceptive coverage to which they object as a matter of religious belief.

[12] As the Court in *Hobby Lobby* noted, the Government could directly subsidize or provide contraceptives to employees of religious non-profit organizations. *See Hobby Lobby*, 134 S. Ct. at 2780-81, slip op. at 41. The direct funding option raises certain feasibility issues. A means that is not a reasonably feasible way of furthering the Government's interest cannot be deemed a less restrictive means of furthering that interest. In *Little Sisters of the Poor*, *Hobby Lobby*, and *Wheaton College*, the Court did not say that direct funding was the least restrictive means of furthering the Government's interest. If it had, then even the *Wheaton College/Little Sisters of the Poor* notice would itself be too restrictive. In any event, what matters in the present case is that the *Wheaton College/Little Sisters of the Poor* notice is less restrictive than the form required by the current federal regulations but still achieves the Government's interest.

One final note for clarity: The Government may of course continue to require the religious organizations' *insurers* to provide contraceptive coverage to the religious organizations' employees, even if the religious organizations object. As Judge Flaum correctly explained, "RFRA does not authorize religious organizations to dictate the independent actions of third-parties, even if the organization sincerely disagrees with them." *University of Notre Dame v. Sebelius*, 743 F.3d 547, 567 (7th Cir. 2014) (Flaum, J., dissenting), *vacated and remanded*, 135 S. Ct. 1528 (2015). "That is true whether the third-party is the government, an insurer, a student, or some other actor." *Id.* "So long as the government does not require" religious organizations themselves "to take action, RFRA does not give" the religious organizations "a right to prevent the government from providing contraceptives to" the religious organizations' employees. *Id.*

* * *

In sum, I respectfully would grant rehearing en banc and rule for the plaintiff religious organizations on the ground that the *Wheaton College/Little Sisters of the Poor* notice is a less restrictive way than the currently mandated form for the Government to achieve its compelling interest in facilitating access to contraception for the organizations' employees.

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5368 **September Term, 2014**

1:13-cv-01261-EGS
1:13-cv-01441-ABJ

Filed on: June 10, 2015-06-10

Priests For Life, et al.,

Appellants

v.

United States Department of Health and Human Services, et al.,

Appellees

Consolidated with 13-5371, 14-5021

BEFORE: Rogers, Pillard, And Wilkins, Circuit Judges

O R D E R

Upon consideration of appellants/cross-appellees' motion for stay of mandate pending petition for writ

of certiorari, to which no opposition has been filed, it is

ORDERED that the motion be granted. The Clerk is directed to withhold the mandate through August 26, 2015. If, within the period of the stay, appellants/cross-appellees notify the Clerk in writing that a petition for writ of certiorari has been filed, the Clerk is directed to withhold issuance of the mandate pending the Supreme Court's final disposition. *See* Fed. R. App. R. 41(d)(2)(B); D.C. Cir. Rule 41(a)(2).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

APPENDIX H

42 U.S.C. § 2000bb-1 provides:

§ 2000bb-1. Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C.A. § 2000bb-2 provides:

§ 2000bb-2. Definitions

As used in this chapter—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

(2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means religious exercise, as defined in section 2000cc-5 of this title.

42 U.S.C. § 2000cc-5 provides:

§ 2000cc-5 Definitions

In this chapter:

(1) Claimant

The term "claimant" means a person raising a claim or defense under this chapter.

(2) Demonstrates

The term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion.

(3) Free Exercise Clause

The term "Free Exercise Clause " means that portion of the First Amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.

(4) Government

The term "government"—

(A) means—

(i) a State, county, municipality, or other governmental entity created under the authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law; and

(B) for the purposes of sections 2000cc-2(b) and 2000cc-3 of this title, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

(5) Land use regulation

The term "land use regulation" means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

(6) Program or activity

The term "program or activity" means all of the operations of any entity as described in paragraph (1) or (2) of section 2000d-4a of this title.

(7) Religious exercise

(A) In general

The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) Rule

The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.

42 U.S.C. § 300gg-13(a)(4) provides:

§ 300gg-13. Coverage of preventive health services

(a) In general

A group health plan and a health insurances issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for—

* * *

(4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.

26 U.S.C. § 4980D provides:

§ 4980D. Failure to meet certain group health plan requirements

(a) General rule.—There is hereby imposed a tax on any failure of a group health plan to meet the requirements of chapter 100 (relating to group health plan requirements).

(b) Amount of tax.—

(1) In general.—The amount of the tax imposed by subsection (a) on any failure shall be $100 for each day in the noncompliance period with respect to each individual to whom such failure relates.

(2) Noncompliance period.—For purposes of this section, the term "noncompliance period" means, with respect to any failure, the period—

(A) beginning on the date such failure first occurs, and

(B) ending on the date such failure is corrected.

(3) Minimum tax for noncompliance period where failure discovered after notice of examination.—Notwithstanding paragraphs (1) and (2) of subsection (c)—

(A) In general.—In the case of 1 or more failures with respect to an individual—

(i) which are not corrected before the date a notice of examination of income tax liability is sent to the employer, and

(ii) which occurred or continued during the period under examination,

the amount of tax imposed by subsection (a) by reason of such failures with respect to such individual shall not be less than the lesser of $2,500 or the amount of tax which would be imposed by subsection (a) without regard to such paragraphs.

(B) Higher minimum tax where violations are more than de minimis.—To the extent violations for which any person is liable under subsection (e) for any year are more than de minimis, subparagraph (A) shall be applied by substituting "$15,000" for "$2,500" with respect to such person.

(C) Exception for church plans.—This paragraph shall not apply to any failure under a church plan (as defined in section 414(e)).

(c) Limitations on amount of tax.—

(1) Tax not to apply where failure not discovered exercising reasonable diligence.—No tax shall be imposed by subsection (a) on any failure during any period for which it is established to the satisfaction of the Secretary that the person otherwise liable for such tax did not know, and exercising reasonable diligence would not have known, that such failure existed.

(2) Tax not to apply to failures corrected within certain periods.—No tax shall be imposed by subsection (a) on any failure if—

(A) such failure was due to reasonable cause and not to willful neglect, and

(B)(i) in the case of a plan other than a church plan (as defined in section 414(e)), such failure is corrected during the 30-day period beginning on the first date the person otherwise liable for such tax knew, or exercising reasonable diligence would have known, that such failure existed, and

(ii) in the case of a church plan (as so defined), such failure is corrected before the close of the correction period (determined under the rules of section 414(e)(4)(C)).

(3) Overall limitation for unintentional failures.—In the case of failures which are due to reasonable cause and not to willful neglect—

(A) Single employer plans.—

(i) In general.—In the case of failures with respect to plans other than specified multiple employer health plans, the tax imposed by subsection (a) for failures during the taxable year of the employer shall not exceed the amount equal to the lesser of—

(I) 10 percent of the aggregate amount paid or incurred by the employer (or predecessor employer) during the preceding taxable year for group health plans, or

(II) $500,000.

(ii) Taxable years in the case of certain controlled groups.—For purposes of this subparagraph, if not all persons who are treated as a single employer for purposes of this section have the same taxable year, the taxable years taken into account shall be determined under principles similar to the principles of section 1561.

(B) Specified multiple employer health plans.—

(i) In general.—In the case of failures with respect to a specified multiple employer health plan, the tax imposed by subsection (a) for failures during the taxable year of the trust forming part of such plan shall not exceed the amount equal to the lesser of—

(I) 10 percent of the amount paid or incurred by such trust during such taxable year to provide medical care (as defined in section 9832(d)(3)) directly or through insurance, reimbursement, or otherwise, or

(II) $500,000.

For purposes of the preceding sentence, all plans of which the same trust forms a part shall be treated as one plan.

(ii) Special rule for employers required to pay tax.—If an employer is assessed a tax imposed by subsection (a) by reason of a failure with respect to a specified multiple employer health plan, the limit shall be determined under subparagraph (A) (and not

under this subparagraph) and as if such plan were not a specified multiple employer health plan.

(4) Waiver by Secretary.—In the case of a failure which is due to reasonable cause and not to willful neglect, the Secretary may waive part or all of the tax imposed by subsection (a) to the extent that the payment of such tax would be excessive relative to the failure involved.

(d) Tax not to apply to certain insured small employer plans.—

(1) In general.— In the case of a group health plan of a small employer which provides health insurance coverage solely through a contract with a health insurance issuer, no tax shall be imposed by this section on the employer on any failure (other than a failure attributable to section 9811) which is solely because of the health insurance coverage offered by such issuer.

(2) Small employer.—

(A) In general.—For purposes of paragraph (1), the term "small employer" means, with respect to a calendar year and a plan year, an employer who employed an average of at least 2 but not more than 50 employees on business days during the preceding calendar year and who employs at least 2 employees on the first day of the plan year. For purposes of the preceding sentence, all persons treated as a single employer under subsection (b), (c), (m), or (o) of section 414 shall be treated as one employer.

(B) Employers not in existence in preceding year.— In the case of an employer which was not in existence throughout the preceding calendar year, the determination of whether such employer is a small

employer shall be based on the average number of employees that it is reasonably expected such employer will employ on business days in the current calendar year.

(C) Predecessors.—Any reference in this paragraph to an employer shall include a reference to any predecessor of such employer.

(3) Health insurance coverage; health insurance issuer.—For purposes of paragraph (1), the terms "health insurance coverage" and "health insurance issuer" have the respective meanings given such terms by section 9832.

(e) Liability for tax.—The following shall be liable for the tax imposed by subsection (a) on a failure:

(1) Except as otherwise provided in this subsection, the employer.

(2) In the case of a multiemployer plan, the plan.

(3) In the case of a failure under section 9803 (relating to guaranteed renewability) with respect to a plan described in subsection (f)(2)(B), the plan.

(f) Definitions.—For purposes of this section—

(1) Group health plan.—The term "group health plan" has the meaning given such term by section 9832(a).

(2) Specified multiple employer health plan.—The term "specified multiple employer health plan" means a group health plan which is—

(A) any multiemployer plan, or

(B) any multiple employer welfare arrangement (as defined in section 3(40) of the Employee Retirement Income Security Act of 1974, as in effect on the date of the enactment of this section).

(3) Correction.—A failure of a group health plan shall be treated as corrected if—

(A) such failure is retroactively undone to the extent possible, and

(B) the person to whom the failure relates is placed in a financial position which is as good as such person would have been in had such failure not occurred.

26 U.S.C. § 4980H provides:

§ 4980H. Shared responsibility for employers regarding health coverage.

(a) Large employers not offering health coverage.—If—

(1) any applicable large employer fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) for any month, and

(2) at least one full-time employee of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee,

then there is hereby imposed on the employer an assessable payment equal to the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

(b) Large employers offering coverage with employees who qualify for premium tax credits or cost-sharing reductions.—

(1) In general. —If—

(A) an applicable large employer offers to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) for any month, and

(B) 1 or more full-time employees of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee,

then there is hereby imposed on the employer an assessable payment equal to the product of the number of full-time employees of the applicable large employer described in subparagraph (B) for such month and an amount equal to 1/12 of $3,000.

(2) Overall limitation.—The aggregate amount of tax determined under paragraph (1) with respect to all employees of an applicable large employer for any month shall not exceed the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

[(3) Repealed. Pub.L. 112-10, Div. B, Title VIII, § 1858(b)(4), Apr. 15, 2011, 125 Stat. 169]

(c) Definitions and special rules.—For purposes of this section—

(1) Applicable payment amount.—The term "applicable payment amount" means, with respect to any month, 1/12 of $2,000.

(2) Applicable large employer.—

(A) In general.— The term "applicable large employer" means, with respect to a calendar year, an employer who employed an average of at least 50 full-time employees on business days during the preceding calendar year.

(B) Exemption for certain employers.—

(i) In general.—An employer shall not be considered to employ more than 50 full-time employees if—

(I) the employer's workforce exceeds 50 full-time employees for 120 days or fewer during the calendar year, and

(II) the employees in excess of 50 employed during such 120-day period were seasonal workers.

(ii) Definition of seasonal workers.—

(C) Rules for determining employer size.—For purposes of this paragraph—

(i) Application of aggregation rule for employers.—All persons treated as a single employer under subsection (b), (c), (m), or (o) of section 414 of the Internal Revenue Code of 1986 shall be treated as 1 employer.

(ii) Employers not in existence in preceding year.—In the case of an employer which was not in existence throughout the preceding calendar year, the determination of whether such employer is an applicable large employer shall be based on the average number of employees that it is reasonably

expected such employer will employ on business days in the current calendar year.

(iii) Predecessors.—Any reference in this subsection to an employer shall include a reference to any predecessor of such employer.

(D) Application of employer size to assessable penalties—

(i) In general.—The number of individuals employed by an applicable large employer as full-time employees during any month shall be reduced by 30 solely for purposes of calculating—

(I) the assessable payment under subsection (a), or

(II) the overall limitation under subsection (b)(2).

(ii) Aggregation—In the case of persons treated as 1 employer under subparagraph (C)(i), only 1 reduction under subclause (I) or (II) shall be allowed with respect to such persons and such reduction shall be allocated among such persons ratably on the basis of the number of full-time employees employed by each such person.

(E) Full-time equivalents treated as full-time employees.—Solely for purposes of determining whether an employer is an applicable large employer under this paragraph, an employer shall, in addition to the number of full-time employees for any month otherwise determined, include for such month a number of full-time employees determined by dividing the aggregate number of hours of service of employees who are not full-time employees for the month by 120.

(3) Applicable premium tax credit and cost-sharing reduction.—The term "applicable premium tax credit and cost-sharing reduction" means—

(A) any premium tax credit allowed under section 36B,

(B) any cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act, and

(C) any advance payment of such credit or reduction under section 1412 of such Act.

(4) Full-time employee—

(A) In general.—The term "full-time employee" means, with respect to any month, an employee who is employed on average at least 30 hours of service per week.

(B) Hours of service.—The Secretary, in consultation with the Secretary of Labor, shall prescribe such regulations, rules, and guidance as may be necessary to determine the hours of service of an employee, including rules for the application of this paragraph to employees who are not compensated on an hourly basis.

(5) Inflation adjustment.—

(A) In general.—In the case of any calendar year after 2014, each of the dollar amounts in subsection (b) and paragraph (1) shall be increased by an amount equal to the product of

(i) such dollar amount, and

(ii) the premium adjustment percentage (as defined in section 1302(c)(4) of the Patient Protection and Affordable Care Act) for the calendar year.

(B) Rounding.—If the amount of any increase under subparagraph (A) is not a multiple of $10, such increase shall be rounded to the next lowest multiple of $10.

(6) Other definitions.—Any term used in this section which is also used in the Patient Protection and Affordable Care Act shall have the same meaning as when used in such Act.

(7) Tax nondeductible.—For denial of deduction for the tax imposed by this section, see section 275(a)(6).

(d) Administration and procedure.—

(1) In general.—Any assessable payment provided by this section shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68.

(2) Time for payment.—The Secretary may provide for the payment of any assessable payment provided by this section on an annual, monthly, or other periodic basis as the Secretary may prescribe.

(3) Coordination with credits, etc.— The Secretary shall prescribe rules, regulations, or guidance for the repayment of any assessable payment (including interest) if such payment is based on the allowance or payment of an applicable premium tax credit or cost-sharing reduction with respect to an employee, such allowance or payment is subsequently disallowed, and the assessable payment would not have been required to be made but for such allowance or payment.

26 C.F.R. § 54.9815–2713 provides:

§ 54.9815–2713 Coverage of preventive health services

(a) Services—

(1) In general. Beginning at the time described in paragraph (b) of this section and subject to

§ 54.9815–2713A, a group health plan, or a health insurance issuer offering group health insurance coverage, must provide coverage for all of the following items and services, and may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible) with respect to those items and services:

(i) [Reserved]

(ii) [Reserved]

(iii) [Reserved]

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, evidence-informed preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration, in accordance with 45 CFR 147.131(a).

(2) Office visits. [Reserved]

(3) Out-of-network providers. [Reserved]

(4) Reasonable medical management. [Reserved]

(5) Services not described. [Reserved]

(b) Timing. [Reserved]

(c) Recommendations not current. [Reserved]

(d) Effective/applicability date. April 16, 2012.

26 C.F.R. § 54.9815–2713A provides:

§ 54.9815–2713A. Accommodations in connection with coverage of preventive health services

(a) Eligible organizations. An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretaries of Health and Human Services and Labor, that it satisfies the criteria in paragraphs (a)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (b) or (c) of this section applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of ERISA.

(b) Contraceptive coverage—self-insured group health plans—(1) A group health plan established or maintained by an eligible organization that provides benefits on a self-insured basis complies for one or more plan years with any requirement under § 54.9815–2713(a)(1)(iv) to provide contraceptive coverage if all of the requirements of this paragraph

(b)(1) of this section are satisfied:

(i) The eligible organization or its plan contracts with one or more third party administrators.

(ii) The eligible organization provides each third party administrator that will process claims for any

contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv) with a copy of the self-certification described in paragraph (a)(4) of this section, which shall include notice that—

(A) The eligible organization will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and

(B) Obligations of the third party administrator are set forth in 29 CFR 2510.3–16 and 26 CFR 54.9815–2713A.

(iii) The eligible organization must not, directly or indirectly, seek to interfere with a third party administrator's arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries, and must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements.

(2) If a third party administrator receives a copy of the self-certification described in paragraph (a)(4) of this section, and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator shall provide or arrange payments for contraceptive services using one of the following methods—

(i) Provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or

indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries; or

(ii) Arrange for an issuer or other entity to provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries.

(3) If a third party administrator provides or arranges payments for contraceptive services in accordance with either paragraph (b)(2)(i) or (ii) of this section, the costs of providing or arranging such payments may be reimbursed through an adjustment to the Federally-facilitated Exchange user fee for a participating issuer pursuant to 45 CFR 156.50(d).

(4) A third party administrator may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such.

(c) Contraceptive coverage--insured group health plans—(1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 54.9815–2713(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan furnishes a copy of the self-certification described in paragraph (a)(4) of this section to each issuer that would otherwise provide such coverage in connection with the group health plan. An issuer may not require any documentation other than the copy of the self-

certification from the eligible organization regarding its status as such.

(2) Payments for contraceptive services—(i) A group health insurance issuer that receives a copy of the self-certification described in paragraph (a)(4) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 54.9815–2713(a)(1)(iv) must—

(A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and

(B) Provide separate payments for any contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act, as incorporated into section 9815. If the group health plan of the eligible organization provides coverage for some but not all of

any contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) Notice of availability of separate payments for contraceptive services—self-insured and insured group health plans. For each plan year to which the accommodation in paragraph (b) or (c) of this section is to apply, a third party administrator required to provide or arrange payments for contraceptive services pursuant to paragraph (b) of this section, and an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section, must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the third party administrator or issuer, as applicable, provides separate payments for contraceptive services, and must provide contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): "Your employer has certified that your group health plan qualifies for an accommodation with respect to the federal

requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your employer will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of third party administrator/health insurance issuer] will provide or arrange separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your group health plan. Your employer will not administer or fund these payments. If you have any questions about this notice, contact [contact information for third party administrator/health insurance issuer]."

(e) Reliance—insured group health plans—

(1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 54.9815–2713(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 54.9815–2713(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

(f)[Reserved]. For further guidance, see § 54.9815-2713AT(f).

26 C.F.R. § 54.9815-2713AT provides:

§ 54.9815-2713AT Accommodations in connection with coverage of preventive health services (temporary).

(a)[Reserved]. For further guidance, see § 54.9815-2713A(a).

(b)Contraceptive coverage--self-insured group health plans. (1) A group health plan established or maintained by an eligible organization that provides benefits on a self-insured basis complies for one or more plan years with any requirement under § 54.9815-2713(a)(1)(iv) to provide contraceptive coverage if all of the requirements of this paragraph (b)(1) are satisfied:

(i) The eligible organization or its plan contracts with one or more third party administrators.

(ii) The eligible organization provides either a copy of the self-certification to each third party administrator or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage of all or a subset of contraceptive services.

(A) When a copy of the self-certification is provided directly to a third party administrator, such self-certification must include notice that obligations of the third party administrator are set forth in 29 CFR 2510.3-16 and this section and under § 54.9815-2713A.

(B) When a notice is provided to the Secretary of Health and Human Services, the notice must include the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on sincerely held religious beliefs to coverage of some or all contraceptive services (including an

identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of 45 CFR 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of Labor (working with the Department of Health and Human Services), will send a separate notification to each of the plan's third party administrators informing the third party administrator that the Secretary of Health and Human Services has received a notice under paragraph (b)(1)(ii) of this section and describing the obligations of the third party administrator under 29 CFR 2510.3-16 and this section and under § 54.9815-2713A.

(2) If a third party administrator receives a copy of the self-certification from an eligible organization or a notification from the Department of Labor, as described in paragraph (b)(1)(ii) of this section, and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator shall provide or arrange payments for contraceptive services using one of the following methods--

(i) Provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment,

coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries; or

(ii) Arrange for an issuer or other entity to provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries.

(3) If a third party administrator provides or arranges payments for contraceptive services in accordance with either paragraph (b)(2)(i) or (ii) of this section, the costs of providing or arranging such payments may be reimbursed through an adjustment to the Federally-facilitated Exchange user fee for a participating issuer pursuant to 45 CFR 156.50(d).

(4) A third party administrator may not require any documentation other than a copy of the self-certification from the eligible organization or notification from the Department of Labor described in paragraph (b)(1)(ii) of this section.

(c) Contraceptive coverage--insured group health plans-- (1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 54.9815-2713(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan provides either a copy of the self-certification to each issuer providing coverage in connection with the

plan or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage for all or a subset of contraceptive services.

(i) When a copy of the self-certification is provided directly to an issuer, the issuer has sole responsibility for providing such coverage in accordance with § 54.9815-2713. An issuer may not require any further documentation from the eligible organization regarding its status as such.

(ii) When a notice is provided to the Secretary of Health and Human Services, the notice must include the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on its sincerely held religious beliefs to coverage of some or all contraceptive services, as applicable (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of 45 CFR 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of Health and Human Services will send a separate notification to each of the plan's health insurance issuers informing the issuer that the Secretary of Health and Human Services has received a notice under paragraph (c)(1)

of this section and describing the obligations of the issuer under this section and under § 54.9815-2713A.

(2) Payments for contraceptive services.

(i) A group health insurance issuer that receives a copy of the self-certification or notification described in paragraph (b)(1)(ii) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 54.9815-2713(a)(1)(iv) must--

(ii)[Reserved]. For further guidance, see § 54.9815-2713A(c)(2)(ii).

(d) [Reserved]. For further guidance, see § 54.9815-2713A(d).

(e) [Reserved]. For further guidance, see § 54.9815-2713A(e).

(f) Expiration date. This section expires on August 22, 2017 or on such earlier date as may be provided in final regulations or other action published in the Federal Register.

29 C.F.R. §§ 2510.3-16 provides:

§ 2510.3-16 Definition of "plan administrator."

(a) In general. The term "plan administrator" or "administrator" means the person specifically so designated by the terms of the instrument under which the plan is operated. If an administrator is not so designated, the plan administrator is the plan sponsor, as defined in section 3(16)(B) of ERISA.

(b) In the case of a self-insured group health plan established or maintained by an eligible organization, as defined in § 2590.715-2713A(a) of this chapter, if the eligible organization provides a copy of the self-

certification of its objection to administering or funding any contraceptive benefits in accordance with § 2590.715-2713A(b)(1)(ii) of this chapter to a third party administrator, the self-certification shall be an instrument under which the plan is operated, shall be treated as a designation of the third party administrator as the plan administrator under section 3(16) of ERISA for any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) of this chapter to which the eligible organization objects on religious grounds, and shall supersede any earlier designation. If, instead, the eligible organization notifies the Secretary of Health and Human Services of its objection to administering or funding any contraceptive benefits in accordance with § 2590.715-2713A(b)(1)(ii) of this chapter, the Department of Labor, working with the Department of Health and Human Services, shall separately provide notification to each third party administrator that such third party administrator shall be the plan administrator under section 3(16) of ERISA for any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) of this chapter to which the eligible organization objects on religious grounds, with respect to benefits for contraceptive services that the third party administrator would otherwise manage. Such notification from the Department of Labor shall be an instrument under which the plan is operated and shall supersede any earlier designation.

(c) A third party administrator that becomes a plan administrator pursuant to this section shall be responsible for--

(1) Complying with section 2713 of the Public Health Service Act (42 U.S.C. 300gg-13) (as

incorporated into section 715 of ERISA) and § 2590.715-2713 of this chapter with respect to coverage of contraceptive services. To the extent the plan contracts with different third party administrators for different classifications of benefits (such as prescription drug benefits versus inpatient and outpatient benefits), each third party administrator is responsible for providing contraceptive coverage that complies with section 2713 of the Public Health Service Act (as incorporated into section 715 of ERISA) and § 2590.715-2713 of this chapter with respect to the classification or classifications of benefits subject to its contract.

(2) Establishing and operating a procedure for determining such claims for contraceptive services in accordance with § 2560.503-1 of this chapter.

(3) Complying with disclosure and other requirements applicable to group health plans under Title I of ERISA with respect to such benefits.

29 C.F.R. § 2590.715–2713 provides:

§ 2590.715–2713 Coverage of preventive health services

(a) Services—

(1) In general. Beginning at the time described in paragraph (b) of this section and subject to § 2590.715–2713A, a group health plan, or a health insurance issuer offering group health insurance coverage, must provide coverage for all of the following items and services, and may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible) with respect to those items and services:

(i) Evidence-based items or services that have in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual involved (except as otherwise provided in paragraph (c) of this section);

(ii) Immunizations for routine use in children, adolescents, and adults that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved (for this purpose, a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention is considered in effect after it has been adopted by the Director of the Centers for Disease Control and Prevention, and a recommendation is considered to be for routine use if it is listed on the Immunization Schedules of the Centers for Disease Control and Prevention);

(iii) With respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in comprehensive guidelines supported by the Health Resources and Services Administration; and

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, evidence-informed preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration, in accordance with 45 CFR 147.131(a).

(2) Office visits—

(i) If an item or service described in paragraph (a)(1) of this section is billed separately (or is tracked as individual encounter data separately) from an office visit, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(ii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is the delivery of such an item or service, then a plan or issuer may not impose cost-sharing requirements with respect to the office visit.

(iii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is not the delivery of such an item or service, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(iv) The rules of this paragraph (a)(2) are illustrated by the following examples:

Example 1.

(i) Facts. An individual covered by a group health plan visits an in-network health care provider. While visiting the provider, the individual is screened for cholesterol abnormalities, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit and for the laboratory work of the cholesterol screening test.

(ii) Conclusion. In this Example 1, the plan may not impose any cost-sharing requirements with

respect to the separately-billed laboratory work of the cholesterol screening test. Because the office visit is billed separately from the cholesterol screening test, the plan may impose cost-sharing requirements for the office visit.

Example 2.

(i) Facts. Same facts as Example 1. As the result of the screening, the individual is diagnosed with hyperlipidemia and is prescribed a course of treatment that is not included in the recommendations under paragraph (a)(1) of this section.

(ii) Conclusion. In this Example 2, because the treatment is not included in the recommendations under paragraph (a)(1) of this section, the plan is not prohibited from imposing cost-sharing requirements with respect to the treatment.

Example 3.

(i) Facts. An individual covered by a group health plan visits an in-network health care provider to discuss recurring abdominal pain. During the visit, the individual has a blood pressure screening, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit.

(ii) Conclusion. In this Example 3, the blood pressure screening is provided as part of an office visit for which the primary purpose was not to deliver items or services described in paragraph (a)(1) of this section. Therefore, the plan may impose a cost-sharing requirement for the office visit charge.

Example 4.

(i) Facts. A child covered by a group health plan visits an in-network pediatrician to receive an annual physical exam described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. During the office visit, the child receives additional items and services that are not described in the comprehensive guidelines supported by the Health Resources and Services Administration, nor otherwise described in paragraph (a)(1) of this section. The provider bills the plan for an office visit.

(ii) Conclusion. In this Example 4, the service was not billed as a separate charge and was billed as part of an office visit. Moreover, the primary purpose for the visit was to deliver items and services described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. Therefore, the plan may not impose a cost-sharing requirement with respect to the office visit.

(3) Out-of-network providers. Nothing in this section requires a plan or issuer that has a network of providers to provide benefits for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider. Moreover, nothing in this section precludes a plan or issuer that has a network of providers from imposing cost-sharing requirements for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider.

(4) Reasonable medical management. Nothing prevents a plan or issuer from using reasonable medical management techniques to determine the frequency, method, treatment, or setting for an item or service described in paragraph (a)(1) of this section

to the extent not specified in the recommendation or guideline.

(5) Services not described. Nothing in this section prohibits a plan or issuer from providing coverage for items and services in addition to those recommended by the United States Preventive Services Task Force or the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention, or provided for by guidelines supported by the Health Resources and Services Administration, or from denying coverage for items and services that are not recommended by that task force or that advisory committee, or under those guidelines. A plan or issuer may impose cost-sharing requirements for a treatment not described in paragraph (a)(1) of this section, even if the treatment results from an item or service described in paragraph (a)(1) of this section.

(b) Timing—

(1) In general. A plan or issuer must provide coverage pursuant to paragraph (a)(1) of this section for plan years that begin on or after September 23, 2010, or, if later, for plan years that begin on or after the date that is one year after the date the recommendation or guideline is issued.

(2) Changes in recommendations or guidelines. A plan or issuer is not required under this section to provide coverage for any items and services specified in any recommendation or guideline described in paragraph (a)(1) of this section after the recommendation or guideline is no longer described in paragraph (a)(1) of this section. Other requirements of Federal or State law may apply in connection with a plan or issuer ceasing to provide

coverage for any such items or services, including PHS Act section 2715(d)(4), which requires a plan or issuer to give 60 days advance notice to an enrollee before any material modification will become effective.

(c) Recommendations not current. For purposes of paragraph (a)(1)(i) of this section, and for purposes of any other provision of law, recommendations of the United States Preventive Services Task Force regarding breast cancer screening, mammography, and prevention issued in or around November 2009 are not considered to be current.

(d) Applicability date. The provisions of this section apply for plan years beginning on or after September 23, 2010. See § 2590.715–1251 of this Part for determining the application of this section to grandfathered health plans (providing that these rules regarding coverage of preventive health services do not apply to grandfathered health plans).

29 C.F.R. § 2590.715-2713A

§ 2590.715-2713A. Accommodations in connection with coverage of preventive health services

(a) Eligible organizations. An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (a)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (b) or (c) of this section applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of ERISA.

(b) Contraceptive coverage--self-insured group health plans—

(1) A group health plan established or maintained by an eligible organization that provides benefits on a self-insured basis complies for one or more plan years with any requirement under § 2590.715-2713(a)(1)(iv) to provide contraceptive coverage if all of the requirements of this paragraph (b)(1) are satisfied:

(i) The eligible organization or its plan contracts with one or more third party administrators.

(ii) The eligible organization provides either a copy of the self-certification to each third party administrator or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage of all or a subset of contraceptive services.

(A) When a copy of the self-certification is provided directly to a third party administrator, such self-certification must include notice that obligations of the third party administrator are set forth in § 2510.3-16 of this chapter and this section.

(B) When a notice is provided to the Secretary of Health and Human Services, the notice must include the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on sincerely held religious beliefs to coverage of some or all contraceptive services (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of 45 CFR 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of Labor (working with the Department of Health and Human Services), shall send a separate notification to each of the plan's third party administrators informing the third party administrator that the Secretary of Health and Human Services has received a notice under paragraph (b)(1)(ii) of this section and describing the obligations of the third party administrator under § 2510.3-16 of this chapter and this section.

(2) If a third party administrator receives a copy of the self-certification from an eligible organization or a notification from the Department of Labor, as described in paragraph (b)(1)(ii) of this section, and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator shall provide or arrange

payments for contraceptive services using one of the following methods--

(i) Provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries; or

(ii) Arrange for an issuer or other entity to provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries.

(3) If a third party administrator provides or arranges payments for contraceptive services in accordance with either paragraph (b)(2)(i) or (ii) of this section, the costs of providing or arranging such payments may be reimbursed through an adjustment to the Federally-facilitated Exchange user fee for a participating issuer pursuant to 45 CFR 156.50(d).

(4) A third party administrator may not require any documentation other than a copy of the self-certification from the eligible organization or notification from the Department of Labor described in paragraph (b)(1)(ii) of this section.

(c) Contraceptive coverage--insured group health plans –

(1) General rule. A group health plan established or maintained by an eligible organization that

provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 2590.715-2713(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan provides either a copy of the self-certification to each issuer providing coverage in connection with the plan or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage for all or a subset of contraceptive services.

(i) When a copy of the self-certification is provided directly to an issuer, the issuer has sole responsibility for providing such coverage in accordance with § 2590.715-2713. An issuer may not require any further documentation from the eligible organization regarding its status as such.

(ii) When a notice is provided to the Secretary of Health and Human Services, the notice must include the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on its sincerely held religious beliefs to coverage of some or all contraceptive services, as applicable (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of 45 CFR 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide

updated information to the Secretary of Health and Human Services. The Department of Health and Human Services will send a separate notification to each of the plan's health insurance issuers informing the issuer that the Secretary of Health and Human Services has received a notice under paragraph (c)(1) of this section and describing the obligations of the issuer under this section.

(2) Payments for contraceptive services --(i) A group health insurance issuer that receives a copy of the self-certification or notification described in paragraph (c)(1)(ii) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 2590.715-2713(a)(1)(iv) must--

(A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and

(B) Provide separate payments for any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must

provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act, as incorporated into section 715 of ERISA. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) Notice of availability of separate payments for contraceptive services--self-insured and insured group health plans. For each plan year to which the accommodation in paragraph (b) or (c) of this section is to apply, a third party administrator required to provide or arrange payments for contraceptive services pursuant to paragraph (b) of this section, and an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section, must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the third party administrator or issuer, as applicable, provides separate payments for contraceptive services, and must provide contact information for

questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): "Your employer has certified that your group health plan qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your employer will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of third party administrator/health insurance issuer] will provide or arrange separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your group health plan. Your employer will not administer or fund these payments. If you have any questions about this notice, contact [contact information for third party administrator/health insurance issuer]."

(e) Reliance--insured group health plans –

(1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 2590.715-2713(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 2590.715-2713(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this

section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

45 C.F.R. § 147.130 provides:

§ 147.130 Coverage of preventive health services. (a) Services—

(1) In general. Beginning at the time described in paragraph (b) of this section and subject to § 147.131, a group health plan, or a health insurance issuer offering group or individual health insurance coverage, must provide coverage for all of the following items and services, and may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible) with respect to those items and services:

(i) Evidence-based items or services that have in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual involved (except as otherwise provided in paragraph (c) of this section);

(ii) Immunizations for routine use in children, adolescents, and adults that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved (for this purpose, a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention is considered in effect after it has been adopted by the Director of the Centers for Disease Control and Prevention, and a recommendation is considered to be for routine use if it is listed on the Immunization

Schedules of the Centers for Disease Control and Prevention);

(iii) With respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in comprehensive guidelines supported by the Health Resources and Services Administration; and

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, evidence-informed preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration.

(A) In developing the binding health plan coverage guidelines specified in this paragraph (a)(1)(iv), the Health Resources and Services Administration shall be informed by evidence and may establish exemptions from such guidelines with respect to group health plans established or maintained by religious employers and health insurance coverage provided in connection with group health plans established or maintained by religious employers with respect to any requirement to cover contraceptive services under such guidelines.

(B) For purposes of this subsection, a "religious employer" is an organization that meets all of the following criteria:

(1) The inculcation of religious values is the purpose of the organization.

(2) The organization primarily employs persons who share the religious tenets of the organization.

(3) The organization serves primarily persons who share the religious tenets of the organization.

(4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

(2) Office visits—

(i) If an item or service described in paragraph (a)(1) of this section is billed separately (or is tracked as individual encounter data separately) from an office visit, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(ii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is the delivery of such an item or service, then a plan or issuer may not impose cost-sharing requirements with respect to the office visit.

(iii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is not the delivery of such an item or service, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(iv) The rules of this paragraph (a)(2) are illustrated by the following examples:

Example 1. (i) Facts. An individual covered by a group health plan visits an in-network health care provider. While visiting the provider, the individual is screened for cholesterol abnormalities, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual.

The provider bills the plan for an office visit and for the laboratory work of the cholesterol screening test.

(ii) Conclusion. In this Example 1, the plan may not impose any cost-sharing requirements with respect to the separately-billed laboratory work of the cholesterol screening test. Because the office visit is billed separately from the cholesterol screening test, the plan may impose cost-sharing requirements for the office visit.

Example 2.

(i) Facts. Same facts as Example 1. As the result of the screening, the individual is diagnosed with hyperlipidemia and is prescribed a course of treatment that is not included in the recommendations under paragraph (a)(1) of this section.

(ii) Conclusion. In this Example 2, because the treatment is not included in the recommendations under paragraph (a)(1) of this section, the plan is not prohibited from imposing cost-sharing requirements with respect to the treatment.

Example 3.

(i) Facts. An individual covered by a group health plan visits an in-network health care provider to discuss recurring abdominal pain. During the visit, the individual has a blood pressure screening, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit.

(ii) Conclusion. In this Example 3, the blood pressure screening is provided as part of an office visit for which the primary purpose was not to deliver

items or services described in paragraph (a)(1) of this section. Therefore, the plan may impose a cost-sharing requirement for the office visit charge.

Example 4.

(i) Facts. A child covered by a group health plan visits an in-network pediatrician to receive an annual physical exam described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. During the office visit, the child receives additional items and services that are not described in the comprehensive guidelines supported by the Health Resources and Services Administration, nor otherwise described in paragraph (a)(1) of this section. The provider bills the plan for an office visit.

(ii) Conclusion. In this Example 4, the service was not billed as a separate charge and was billed as part of an office visit. Moreover, the primary purpose for the visit was to deliver items and services described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. Therefore, the plan may not impose a cost-sharing requirement for the office visit charge.

(3) Out-of-network providers. Nothing in this section requires a plan or issuer that has a network of providers to provide benefits for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider. Moreover, nothing in this section precludes a plan or issuer that has a network of providers from imposing cost-sharing requirements for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider.

(4) Reasonable medical management. Nothing prevents a plan or issuer from using reasonable medical management techniques to determine the frequency, method, treatment, or setting for an item or service described in paragraph (a)(1) of this section to the extent not specified in the recommendation or guideline.

(5) Services not described. Nothing in this section prohibits a plan or issuer from providing coverage for items and services in addition to those recommended by the United States Preventive Services Task Force or the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention, or provided for by guidelines supported by the Health Resources and Services Administration, or from denying coverage for items and services that are not recommended by that task force or that advisory committee, or under those guidelines. A plan or issuer may impose cost-sharing requirements for a treatment not described in paragraph (a)(1) of this section, even if the treatment results from an item or service described in paragraph (a)(1) of this section.

(b) Timing—

(1) In general. A plan or issuer must provide coverage pursuant to paragraph (a)(1) of this section for plan years (in the individual market, policy years) that begin on or after September 23, 2010, or, if later, for plan years (in the individual market, policy years) that begin on or after the date that is one year after the date the recommendation or guideline is issued.

(2) Changes in recommendations or guidelines. A plan or issuer is not required under this section to provide coverage for any items and services specified

in any recommendation or guideline described in paragraph (a)(1) of this section after the recommendation or guideline is no longer described in paragraph (a)(1) of this section. Other requirements of Federal or State law may apply in connection with a plan or issuer ceasing to provide coverage for any such items or services, including PHS Act section 2715(d)(4), which requires a plan or issuer to give 60 days advance notice to an enrollee before any material modification will become effective.

(c) Recommendations not current. For purposes of paragraph (a)(1)(i) of this section, and for purposes of any other provision of law, recommendations of the United States Preventive Services Task Force regarding breast cancer screening, mammography, and prevention issued in or around November 2009 are not considered to be current.

(d) Applicability date. The provisions of this section apply for plan years (in the individual market, for policy years) beginning on or after September 23, 2010. See § 147.140 of this Part for determining the application of this section to grandfathered health plans (providing that these rules regarding coverage of preventive health services do not apply to grandfathered health plans).

45 C.F.R. § 147.131 provides:

§ 147.131 Exemption and accommodations in connection with coverage of preventive health services.

(a) Religious employers. In issuing guidelines under § 147.130(a)(1)(iv), the Health Resources and Services Administration may establish an exemption from such guidelines with respect to a group health plan established or maintained by a religious

employer (and health insurance coverage provided in connection with a group health plan established or maintained by a religious employer) with respect to any requirement to cover contraceptive services under such guidelines. For purposes of this paragraph (a), a "religious employer" is an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

(b) Eligible organizations. An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 147.130(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (b)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (c) of this section applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974.

(c) Contraceptive coverage—insured group health plans—

(1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan provides either a copy of the self-certification to each issuer providing coverage in connection with the plan or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage for all or a subset of contraceptive services.

(i) When a self-certification is provided directly to an issuer, the issuer has sole responsibility for providing such coverage in accordance with § 147.130. An issuer may not require any further documentation from the eligible organization regarding its status as such.

(ii) When a notice is provided to the Secretary of Health and Human Services, the notice must include the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on its sincerely held religious beliefs to coverage of some or all contraceptive services, as applicable (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of § 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any

of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of Health and Human Services will send a separate notification to each of the plan's health insurance issuers informing the issuer that the Secretary of Health and Human Services has received a notice under paragraph (c)(1) of this section and describing the obligations of the issuer under this section.

(2) Payments for contraceptive services—

(i) A group health insurance issuer that receives a copy of the self-certification or notification described in paragraph (c)(1)(ii) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 147.130(a)(1)(iv) must--

(A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and

(B) Provide separate payments for any contraceptive services required to be covered under § 147.130(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or

plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered under § 147.130(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) Notice of availability of separate payments for contraceptive services--insured group health plans and student health insurance coverage. For each plan year to which the accommodation in paragraph (c) of this section is to apply, an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the issuer provides separate payments for contraceptive services, and must provide contact information for questions and

complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): "Your [employer/institution of higher education] has certified that your [group health plan/student health insurance coverage] qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your [employer/institution of higher education] will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of health insurance issuer] will provide separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your [group health plan/student health insurance coverage]. Your [employer/institution of higher education] will not administer or fund these payments. If you have any questions about this notice, contact [contact information for health insurance issuer]."

(e) Reliance –

(1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 147.130(a)(1)(iv) to

provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

(f) Application to student health insurance coverage. The provisions of this section apply to student health insurance coverage arranged by an eligible organization that is an institution of higher education in a manner comparable to that in which they apply to group health insurance coverage provided in connection with a group health plan established or maintained by an eligible organization that is an employer. In applying this section in the case of student health insurance coverage, a reference to "plan participants and beneficiaries" is a reference to student enrollees and their covered dependents.